Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

In the Matter of Sanctions
Imposed Upon Two Attorneys,

LARRY KLAYMAN and
PAUL J. ORFANEDES,

Petitioners.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

RAMSEY CLARK
Counsel of Record
LAWRENCE W. SCHILLING
Attorneys for Petitioners
36 East 12th Street
New York, New York 10003
(212) 475-3232

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Questions Presented

1. Whether a federal judge should recuse himself in a case in which a lead attorney has been largely responsible for a major national controversy and media frenzy sometimes called AsiaGate or IndoGate in which the attorney was charged with racism during the trial by President Clinton and other Democratic Party officials for prosecuting an FOIA case seeking evidence of large systematic illegal political fund raising and contributions by Asians and persons of Asian descent by a prominent Asian-American leader, John Huang, who had known President Clinton for years in Arkansas, served as Deputy Assistant Secretary of Commerce in the Clinton Administration, was assigned by the Democratic National Committee to raise funds in the Asian and Asian American communities and was a prominent figure in processing appointments of Asian-Americans to government office who had been deposed by petitioner only days before trial causing sensational adverse publicity for Mr. Huang and the Clinton Administration, if the Judge, who was Asian-American and had been appointed recently by President Clinton, personally knew and felt indebted to Mr. Huang for his appointment to the bench, followed the controversy in the daily press which prominently mentioned petitioner and believed during the trial that petitioner was prejudiced against Asians and Asian-Americans.

2. Whether a federal judge should answer questions about whether he knew and had any associations with John Huang, or was aware of media coverage of the Asiagate-IndoGate political fund raising scandals in which an attorney in a case in his court had exposed and questioned the legality of political fund raising activities of Mr. Huang who invoked the Fifth Amendment, was publicly disgraced and went into hiding, where the attorney presented the court with documents and circumstances from which it could be reasonably believed the judge knew John Huang personally, may have been indebted to him for his appointment to the bench and may have resented what President Clinton and others called racially motivated attacks on Asian-Americans and John Huang because of their

political fund raising and efforts to secure governmental appointment.

3. Whether an attorney is sanctionable for asking a judge to answer written neutrally stated questions sent to chambers and not made in public to determine whether the judge knew, or had any associations with John Huang and was aware of media coverage of the AsiaGate-IndoGate political fund raising scandal in which the attorney had exposed and questioned the legality of political fundraising activities of Mr. Huang leading to his public disgrace when the attorney had to prepare post trial motions in a case before the judge, and reasonably believed the judge knew John Huang personally, may have been indebted to him for his appointment to the bench and may have resented what President Clinton and others called racially motivated attacks on Asian-Americans and John Huang because of their political fund raising and efforts to secure government appointments.

4. Whether an attorney is protected by due process rights to notice of charges against him, a hearing or other opportunity to present evidence in his defense and an impartial Judge in disciplinary hearings.

5. Whether questions asked by an attorney to determine whether there may be cause to move for recusal of a judge, or mistrial are protected by the First Amendment.

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Citation of Opinions Entered in this Case

The citation for the opinions entered in this case are:

138 F.3d 33 (2d Cir. 1998)
994 F.Supp. 447 (SDNY 1997)

Basis for Jurisdiction in this Court

The judgment sought to be reviewed was entered on February 18, 1998. An order denying rehearing was entered on April 15, 1998. 28 U.S.C. §1254(1) confers jurisdiction on the Court to review the judgment in question on a writ of certiorari.

Constitutional Provisions, Statutes and Rules Involved

This case involves the freedom of speech provisions of the First Amendment and the due process of law provisions of the Fifth Amendment to the U.S. Constitution and the provisions of the local and disciplinary rules invoked by the District Court. Text of the pertinent provisions is included in the Appendix, A-74.

Statement of the Case

Petitioners are seeking to overturn potentially ruinous sanctions imposed upon them as attorneys in February 1997 by U.S. District Judge Denny Chin following the bench trial before Judge Chin of a civil commercial case in the Southern District of New York. Judge Chin imposed the sanctions finding petitioners had called his fairness and impartiality as a judge into question because he is Asian-American, effectively branding them as racists. Petitioners have adamantly denied this throughout the case. There is no basis for it. It is a harmful and mistaken judicial reaction to a necessary action they undertook in good faith to fulfill their duty as they understood it as lawyers to their client.

Mr. Klayman is the founder and principal member of Klayman and Associates, P.C., a Washington, D.C. law firm, with an international commercial practice. Mr. Orfanedes is associated with the firm. Mr. Klayman is also the founder and a principal officer of Judicial Watch, Inc., a non-profit public interest, government-watchdog organization that among other activity has initiated many Freedom of Information Act (FOIA) requests and lawsuits to bring to light and remedy improper political campaign financing practices and related activities by government officials, political parties and contributors. The litigation bearing directly on the present case and the sanctions imposed by Judge Chin is an FOIA lawsuit, Judicial Watch, Inc. v. U.S. Department of Commerce, filed in the federal district court in Washington, D.C. in 1995. The campaign financing activities addressed in Judicial Watch's litigation are part of what has become one of the largest and still unfolding political campaign fund raising scandals in U.S. history. It has been the subject of at least two investigations by Congressional Committees and remains the subject of ongoing investigations by the U.S. Department of Justice.

As the scandals unfolded in the fall of 1996, several Asian-Americans, including John Huang, a long time acquaintance of President Clinton, who had held high positions in the U.S. Department of Commerce and the Democratic National Committee, and who had open access to the White

House became the focus of charges which included allegations of illegal political contributions from foreign interests in Indonesia, Taiwan, China, Thailand and other Asian countries, plus Asian American interests. As a result, the Democratic National Committee voluntarily refunded more than $2,000,000 solicited and contributed by Asians or Asian-Americans. As the scandal deepened the Asian-American community increasingly felt Asian-Americans were being unfairly singled out based upon bias and prejudice toward Asian-Americans. The media sometimes referred to it as "AsiaGate," or "Indogate."

On October 29, 1996, on the eve of the bench trial before Judge Chin that began on November 6, 1996, Mr. Klayman took John Huang's deposition in the Commerce Department case. The deposition created widespread and intense media attention. As a result, Mr. Klayman was mentioned, interviewed and quoted extensively concerning the scandal, in the press and on television and radio programs throughout the country including the metropolitan New York area.

As the bench trial began, petitioners had no concern that the litigation they were conducting in Washington and the scandal they had been instrumental in uncovering with its ongoing attendant publicity would impact on the trial. Neither Judge Chin's being an Asian American nor his being a Clinton appointee caused petitioners any concern about Judge Chin's fairness and impartiality as a judge.

The trial took place on November 6, 7 and 12. On November 13, ruling from the bench, Judge Chin granted defendant's motion for judgment as a matter of law against plaintiff, MacDraw, Inc., petitioners' client on partial findings under Fed.R.Civ.P. 52(c). Judge Chin ruled that plaintiff had not met its burden of proof on the claims that had been tried based on his findings on the credibility of witnesses, and dismissed the case with prejudice. Judge Chin and petitioner Klayman engaged in a colloquy over the conduct of the case on that day.

As the trial before Judge Chin drew to an end and especially on November 13, it appeared to petitioners and to two officers of their client, who had testified and remained at the trial as spectators, that Judge Chin was inexplicably hostile toward petitioners and MacDraw's case.

Petitioners were also acutely aware that the Clinton Administration and the Democratic National Committee were publicly seeking to portray Judicial Watch and the growing campaign finance scandal as a racist attack on the Asian American community by right wing extremists. During the bench trial before Judge Chin, at a November 8, 1996 press conference, President Clinton suggested that the burgeoning campaign finance scandal was based on bias and prejudice towards the Asian American community. Willie Brown, the Mayor of San Francisco, called the Judicial Watch case against the Commerce Department a "racist witch hunt." On December 2, 1996, a private public interest group named the Coalition of Asian-Pacific Americans moved in the case for leave to appear as amicus curiae in support of a motion by Ms. Melinda Yee, a former Department of Commerce official, for a protective order against a subpoena issued by Judicial Watch for the taking of her deposition in San Francisco. The Coalition sought leave to appear as amicus to "protect not only Ms. Yee's individual rights, but also the rights of the Asian-Pacific American community." The Coalition's brief described the media coverage of petitioner Klayman's deposition of Mr. Huang as having "created a widespread stereotype image of Americans of Asian-Pacific ancestry playing an improper role in American politics, based upon the recurring theme of guilt by association," and stated that "the publicity surrounding Mr. Huang's deposition testimony has had a particularly negative effect on Asian-Pacific Americans who were active in politics or government."

Petitioners were inundated with Commerce Department documents, investigation materials and media reports on the case. They knew in early December 1996, that the universe of Asian Americans engaged in raising funds from Asians and Asian Americans for the Democratic National Committee and recommending and processing Asian Americans

for political appointments, as well as the number of Asian Americans appointed to major positions in the Clinton Administration, was sufficiently small to create some probability that persons included would know each other. John Huang was the most prominent fund raiser and active promoter of Asian Americans for political appointments. Judge Chin before his appointment to the bench was commendably a prominent activist for Asian American civil rights and in Asian American lawyers' groups and held leadership positions in important organizations.

The probability that the two men knew each other was very high. John Huang was widely known and reported to have recommended and screened candidates for positions in the Administration. The probability that the Judge Chin was interviewed by Mr. Huang before his appointment was high, as was the probability that Mr. Huang made an important endorsement of Judge Chin's nomination. It would be poor political management if it were otherwise. Minority candidates for political appointment who are not celebrities, friends of persons close to the appointment process, or supported within their own group, are unlikely to secure appointment. Both men's names appeared among half a dozen others in several documents from Commerce Department, Democratic National Committee and White House files. Judge Chin was listed first on a four page document of Clinton Administration Asian American political appointees found in Mr. Huang's files.

Following the trial, in early December 1996, in the course of discovery in the Department of Commerce case, the government produced, among many documents, an article from the magazine Asian Week that was marked as an exhibit at Ms. Yee's deposition on December 4. The article appeared in November 1994, but was unknown by petitioners until early December 1996. It described intense and successful efforts by the Democratic National Committee to secure high level federal appointments for Asian-Americans. The article named John Huang and Judge Chin among six examples of such appointments. John Huang had moved to the Democratic National Committee and headed its Asian-American activities. The document reinforced petitioners' awareness of the close

ties within the Asian-American community and further suggested that Mr. Huang and Judge Chin probably knew one another, and that Mr. Huang as a person with influence in the Clinton Administration may have been instrumental in securing Judge Chin's appointment.

Judge Chin was appointed by President Clinton near the end of the second year of his first term. Judge Chin might well have felt personally indebted to Mr. Huang for his selection. It was probable that Mr. Huang personally knew and successfully promoted Judge Chin for his appointment.

Against this background and with Judge Chin's inexplicable hostility fresh in their minds petitioners thought it possible that the activities of Judicial Watch and Mr. Klayman may have been a source of possible bias or animus against them by Judge Chin's, which hurt their client, and decided that they were required by duties owed to their client to make inquiry into the facts.

On December 9, 1996, the Monday after Mr. Klayman returned from taking Ms. Yee's deposition in San Francisco, petitioners wrote to Judge Chin seeking clarification of items to be taxed as costs and in a single paragraph asked him whether he knew Mr. Huang or others, what contacts, or dealings, if any, he had with them and whether he had seen any of the media coverage of the controversy in the following language:

> Finally, as you may know, Mr. Orfanedes and I have been involved in very highly publicized and significant public litigation, Judicial Watch, Inc. v. U.S. Department of Commerce, Case No. 95-0133 (RCL)(DDC), which involves a Mr. John Huang, Ms. Melinda Yee and other persons in the Asian and Asian-American communities. See Exhibit 1. Recently, we came upon a document in this case which mentions your name in the context of other prominent Asian-American appointees of the Clinton Administration. See Exhibit 2.

> Accordingly, could you please formally advise us whether you know either of these individuals, as well as what relationship, contacts and/or business, political or personal dealings, if any, you have had with them, or persons related in any way to the Clinton Administration. Please also advise us if you had seen the enclosed or similar newspaper articles or press accounts before this case was tried on November 6, 7, 12 and 13, 1996.

In the next and final paragraph of the letter, misstating the due date for post-trial motions, petitioners wrote:

> We thank the Court for its immediate attention to this matter, as any post-trial motions must be filed by November 16, 1996.

Petitioners sent this letter and accompanying exhibits to Chambers and did not file it, or mentioned it publicly.

Following his receipt of the letter, Judge Chin scheduled a conference, without specifying the purpose, which took place on December 19, 1996.

Judge Chin began the conference by addressing the issues on itemization of costs, and then stated that "the real reason I wanted you to come in was in the next to last paragraph of the letter." Judge Chin read the last two paragraphs verbatim for the record, and then asked:

> I would like to know, Mr. Klayman and Mr. Orfanedes, what is the basis for asking me these questions.

Mr. Klayman began his answer to the Court by referring to the highly publicized litigation and citing reasons he had become concerned, on behalf of his client, that his role in the Department of Commerce litigation somehow caused the court to view him negatively to the injury of his client.

Judge Chin interrupted to say, "Really what I want to know.... What I hear is that you are asking questions of me because you have some questions about my fairness and impartiality because of my race. Is that not so?"

Mr. Klayman responded, "No, that's not so, your Honor."

Judge Chin then pursued the question of race again and again, trying to force an admission that the questions were asked only because the Court was Asian-American and that petitioners were somehow charging him with bias solely because of his race. Judge Chin completely ignored the subject of the questions, did he know John Huang and others, what contacts, or dealings, if any, he had with them and had he seen any media coverage of the controversy.

Judge Chin adjourned the conference on December 19, 1996 without taking any action on the subject of the December 9 letter, or directing any action to be taken by appellants.

On January 10, 1997, Judge Chin issued an order directing petitioners to show cause in writing why... "by their conduct in this case on November 13, 1996 and December 19, 1996 and their letter to the Court dated December 9, 1996":

> "... they should not be sanctioned or otherwise disciplined for violating Disciplinary Rules 1-102(A)(5) ("A lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice.") and/or 7-106(C)(6) ("In appearing as a lawyer before a tribunal, a lawyer shall not . . . [e]ngage in undignified or discourteous conduct which is degrading to a tribunal.")... [brackets and parenthesis in original]

The order called for the written response by January 24, 1997, which petitioners through counsel timely submitted.

The response, which is reproduced in the Appendix to this petition, A-40, further explained the basis for the

inquiry petitioners made in their December 9 letter. In it, petitioners deny they had made the inquiry because Judge Chin was an Asian-American. The response by petitioners' lawyers, offered an apology:

> If by some failure of communication on their part the Court believed otherwise (i.e. believed it had been accused of prejudice because of its race), they apologize. They had no such intention and deeply regret that it appeared to the Court that they did. A-48.

Judge Chin rejected petitioners' explanations and ignored their apology in a 36 page opinion filed on February 5, 1997, which began with the sentence:

> In this case, I find myself in the position of having my fairness and impartiality as a judge called into question because of my race. A-10.

By this question, the Court converted the questions petitioners asked it to determine whether bias existed into a charge that petitioners asked racist questions.

The opinion found "by clear and convincing evidence," that petitioners had violated DR1-102(A)5) and DR7-106(C)(b), and concluded that "petitioners have engaged in significant abuse, unreasonable conduct, and acts of bad faith," and that "[t]heir conduct had degraded the legal profession and disserved justice," A-36. The order revoked petitioners' pro hac vice status in the case before Judge Chin. It provided that any future pro hac vice application by petitioners to appear in any future cases before Judge Chin would be denied and required petitioners to provide a copy of Judge Chin's opinion to any other judge in the Southern District of New York to whom they might make a future application for admission pro hac vice. Finally, it directed the Clerk of the Court to transmit a copy of the opinion to the courts where petitioners are admitted to practice. A-37.

Petitioners immediately moved before Judge Chin for a

temporary stay and seal of the opinion and order which had already been placed in the public record. Late on February 5, Judge Chin stayed and sealed the order until February 18, 1997, but declined to order a stay and seal pending appeal.

Petitioners filed a notice of appeal on February 14, and moved in the Court of Appeals to continue the stay and seal pending appeal. On February 14, 1997, the Court ordered the stay and seal to continue pending hearing of the motion. On February 19, 1997, Judge Chin, acting without knowledge of the Court's order continuing the stay and seal, sua sponte filed an order unsealing his opinion and order and vacating the stay he had granted. Upon learning through counsel of the order of the Court of Appeals continuing the stay and seal, Judge Chin vacated his order of February 19 by a second order on that day.

Petitioners' motion for a stay and seal was heard on February 25, 1997. In a ruling from the bench, the Court of Appeals ordered the stay and seal to be continued pending further order of the Court and directed that the appeal be expedited, with appellants' brief and the appendix to be filed within eight days, by March 5, 1997, with the appeal to be argued the week of March 17, 1997. Petitioners timely filed their brief on March 5. The Court of Appeals rescheduled argument for May 15, 1997 and issued its decision nine months later, on February 18, 1998, affirming the judgment below. A-1.

Petitioners filed a timely petition for rehearing and suggestion for rehearing en banc. The petition was denied by order entered on April 15, 1998. A-38. No vote was taken on the suggestion for en banc consideration.

This petition followed.

Although the District Court's docket for this case has no entry showing distribution by the Clerk of Judge Chin's opinion and petitioners have received no notice or copies of letters transmitting the opinion, to date petitioners have been contacted by two state disciplinary agencies, from among the

many courts in which they are admitted to practice, that have received copies of the opinion from the Clerk of the District Court.

Reasons for Granting the Writ

I. The Decision Below Creates The Appearance That Federal Courts Will Block Reasonable Inquiry, Refuse To Answer Questions, Charge Attorneys Who Ask Them With Racist Motives And Punish Them Without Providing Due Process And In Violation Of First Amendment Rights For Inquiring To Determine If A Judge Is Impartial

The opinions below create the appearance that federal courts will not tolerate or respond to questions or comments from attorneys that are asked in proceedings before them to determine their impartiality. They approve vindictive sanctions without affording due process and in violation of First Amendment rights against lawyers who ask such questions of judges even where the lawyers reasonably believe the questions are necessary to protect the rights of a client.

The opinions will encourage Courts to arbitrarily punish lawyers for questions and statements courts may find offensive. They threaten to undermine respect for the courts and to inhibit attorneys who have a duty to protect their clients from judicial bias and its appearance from asking questions to determine if bias may exists. The Supreme Court should exercise its inherent supervisory authority and because of the important Constitutional issues, rules violations and conflicting caselaw cited, grant review.

Petitioners were faced with an important ethical decision only days after an adverse judgment was entered against their client by a District Judge, with the cut-off date for post trial motions near, following a bench trial in which they came to believe the judge was hostile toward them.

The trial had begun a week after petitioner Klayman

deposed John Huang in an FOIA case seeking information from the Commerce Department concerning the role of its officials in raising funds for the Democratic Party. The deposition created immediate sensational nationwide publicity, leading to the resignation of Mr. Huang and others. Mr. Huang invoked the Fifth Amendment and disappeared. Major investigations called AsiaGate and IndoGate followed. They centered on the President and his party. They are still in progress. In the middle of the bench trial President Clinton, during a press conference, suggested the scandal exposed by petitioners' litigation was based on prejudice against the Asian-American community. Petitioner Klayman was mentioned in most media comments at the time and was the focus of attacks by Asian-American groups, Democratic Party officials and supporters of the President.

Petitioners saw evidence in the Commerce Department case that John Huang was intensively involved in raising funds from Asians and Asian-Americans and in recommending and obtaining the appointments of Asian-Americans to positions in government. Five days before writing the December 9, 1996 letter to Judge Chin, petitioner Klayman took the deposition in San Francisco of Melinda Yee, a former Commerce Department official. Petitioners found among documents provided by the Commerce Department in connection with that deposition one linking Judge Chin with John Huang which it attached to the December 9 letter. Another document, a four page list headed "Clinton Administration Asian Pacific American Appointees" found in Mr. Huang's files included Judge Chin's name at the top of the list. These documents, other investigative materials and reports in the media linking John Huang to fund raising and government appointments of Asian-Americans reinforced the circumstances which associated Judge Chin and Mr. Huang, causing petitioners to believe it was highly probable that Judge Chin knew Mr. Huang. They supported a reasonable belief that Mr. Huang suggested the possibility of Judge Chin's appointment by President Clinton to the judiciary, may have recommended the appointment from his position as an advisor on Asian-American appointments and as a personal friend of the President and may have actively helped process the approval, clearances and nomination of

Judge Chin. Petitioners had a reasonable basis to believe Judge Chin had a personal relationship with John Huang, felt indebted to him and at the time considered Mr. Huang to be a man of integrity wrongfully maligned for racist reasons.

Petitioners could have failed to act to protect their client. Instead, they did the hard thing. They wrote Judge Chin a letter, sent to Chambers and not filed with the clerk, or made public, providing copies only to opposing counsel. In the letter they asked Judge Chin in one short paragraph of four sentences to be advised formally, (1) whether Judge Chin knew John Huang, or Melinda Yee and the relationships, contacts, or business, political or personal dealings, if any, with them, or persons related to the Clinton Administration; and (2) whether Judge Chin had seen the enclosed or similar newspaper articles or media accounts reporting on petitioners' highly publicized litigation before the end of the trial on November 13, 1996.

The enclosures included the article produced by the Department of Commerce on December 4, 1996 from Asian Week. This article named six prominent Asian-American appointees of the Clinton Administration including John Huang and the Judge, demonstrating the small number involved, their community of interests and the probability they knew each other. Also attached were two articles from national magazines, a Time cover story, and Newsweek, two from the New York Post, and three from the Wall Street Journal, all published in October or November 1996. A-52, et seq. The articles provided information about Mr. Huang, Judicial Watch, Mr. Klayman, the Commerce FOIA litigation, and the larger controversy concerning political fund raising by the Clinton Administration of which Judicial Watch and petitioners were part. They showed the highly publicized and emotional nature of the subject and identified petitioner Klayman as the chief protagonist of Mr. Huang. They were just a sampling of the scores of print media, television and radio reports, appearing in the New York area, naming Mr. Huang, Mr. Klayman and Judicial Watch in October and November 1996. They included information about political fund raising, political appointments of Asian-Americans, allegations of improper conduct by Mr. Huang and presented

petitioner Klayman as a controversial lawyer responsible for the exposure. Front page stories named petitioner Klayman and reported on Mr. Huang's allegedly illegal activities and disappearance.

The December 9 letter was a discrete way of determining whether Judge Chin knew John Huang and might have been affected by that association. It was not accusatory or inflammatory. It was private and need never have been made public.

If Judge Chin was aware of the media coverage, the anger in the Asian-American community over the focus of the scandal on it, the President's comments, the central role played by John Huang both in political fund raising in the Asian and Asian-American communities and in finding and promoting Asian-American persons for government appointments, of Mr. Huang's disgrace, dismissal and disappearance, and if Judge Chin knew Mr. Huang, met with him, was sponsored by him and felt indebted to him for his support, or had an even closer relationship, then actual bias might be present. The appearance of bias would be overwhelming.

Petitioners were caught up in a sensational and rapidly expanding national scandal with unpredictable developments occurring nearly daily, primarily from media investigations. They were inundated with documents, seeking more and preparing for depositions in the FOIA case. They had only a short time remaining to file post trial motions in the case before Judge Chin. They reasonably believed Judge Chin knew and had probably met Mr. Huang and that Mr. Huang had probably been involved in sponsoring Judge Chin's nomination. They believed they had a duty to find out what relationship, "if any," there was between Judge Chin and Mr. Huang. They knew Judge Chin would know and believed that he ought to provide their clients the answers. They assumed the facts would come out in time, but to protect their client they needed to act immediately.

Judge Chin has never revealed whether he knows John Huang, had any contacts, or personal dealings with him, or

whether he was aware of and personally disturbed by the publicity surrounding the AsiaGate-IndoGate scandals.

After receipt of the letter, Judge Chin scheduled a conference calling petitioners from Washington to New York without specifying the purpose. Following brief comments about the itemization of court costs in the case, the District Judge said, "Now the real reason I wanted you to come in is in the last paragraph..." of the December 9 letter which asked Judge Chin if he knew Mr. Huang and for related information. As petitioner Klayman tried to explain the reason for the letter the Judge interrupted to say,

> "What I hear is that you are asking questions of me because you have some question about my impartiality because of my race. Is that not so?"

"Mr. Klayman: No, that's not so, your Honor." A-19, A-47.

There was no basis for the Judge's assertion except the questions. The questions provided no basis for it. The letter clearly did not ask questions because of any concern that the court was biased because of his race. Judge Chin used petitioners' proper inquiry to the Court which ought to have been answered to accuse petitioners of asking racist questions.

Later assertions by the District Court and the Court of Appeals that petitioners and their counsel admitted the questions were based in part on race fail to state that such "admissions" were only that "Asian American" was necessarily mentioned as part of the subject matter of the letter.

The District Court entered an order to show cause on January 10, 1997 calling for a reply in writing, rather than scheduling a hearing. Counsel filed a letter response on January 24, 1997, to explain the reasons for some comments on November 13 and December 19 which they had to assume were the concern of the court and for petitioners' December 9 letter.

The reply called to the Court's attention

> ABA Model Code of Judicial Conduct, Commentary to Canon 3(E), "... A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." A-43.

It further described the dispute as a misunderstanding "unfortunate for counsel and the court" and apologized:

> Both deny absolutely that they harbor any prejudice toward any Asian, Asian American, or any person because of race. Their record is clear. If by some failure of communication on their part the Court believed otherwise, they apologize. They had no such intention and deeply regret that it appeared to the Court that they did. A-48.

The District Court responded twelve days later with a 36 page opinion which began, "In this case, I find myself in the position of having my fairness and impartiality as a judge called into question because of my race." Copies of the opinion were delivered to the press room. The Judge again responded to a proper inquiry by petitioners made to protect a client's rights by directly accusing them of racism without basis. The questions asked only whether Judge Chin knew John Huang, and if so, what association, if any, the two had and whether he was familiar with the publicity.

The Court of Appeals affirmed the sanctions imposed on petitioners on the erroneous basis that "The December 9 letter posed interrogatories to the District Judge strongly implying that he was not impartial based solely on his appointment by the Clinton Administration and on his being Asian-American." A-6, see also A-2, A-7.

The letter does not imply bias directly, or indirectly,

except for the fact that the questions were asked. The questions and their context are completely neutral. References to Asian-Americans in the letter were necessary background. The allegedly illegal fund raising and the relevant political appointments involved Asian-Americans. All the persons named were Asian-Americans. The letter included seven exhibits from magazines and newspapers without characterizing them and included a recently discovered document that "mentions" Judge Chin in the "context" of five other Asian-American appointees of the Clinton Administration including John Huang.

The Court of Appeals quoted part of a lengthy paragraph from petitioners' reply to Judge Chin, also quoted by Judge Chin in his opinion, that included the statement that they reasonably believed their FOIA lawsuit

> ... elicited such angry responses from the White House, Democrats and the Asian-American community that the Court might be angry at them and unable to be fair and impartial in a case in which they were counsel. A-46.

This sentence quoted earlier stated among other things

> ... The Court was a recent appointee of President Clinton and Mr. Huang was a principle advisor in Asian-American appointments and fund raising and Mr. Klayman had been prominently mentioned in the media for his role in the Commerce Department case.... A-46.

The next sentence in petitioners' reply read:

> [Petitioners] reasonably believed they had a duty to their client to determine whether the court had any associations with John Huang, Melinda Yee or other persons related to the Clinton Administration that might cause some prejudice affecting their client. A-46.

On the next page of its opinion the Court of Appeals stated

> There is no factual basis for the suggestion made in the December 9 letter other than Judge Chin's appointment by the Clinton Administration and his race and ethnicity. A-8.

The basis for petitioners' reasonable belief was clearly set forth in the December 9 letter and exhibits and in petitioners' reply to the show cause order. The exhibits attached to the December 9 letter included the document, Exhibit 13 in the Yee deposition, which named John Huang and Judge Chin among six prominent Asian-American appointees of the Clinton Administration. It was quoted in petitioners' response. The response cited "As an illustration, a four page list headed "Clinton Administration-Asian Pacific American Appointees" found in Mr. Huang's files includes your [Judge Chin's] name at the top of the list." A-45. The Court of Appeal failed to recognize that the December 9 letter sought only information about any relationship between Judge Chin and John Huang and whether the judge was aware of the media coverage. The questions were warranted.

When the December 9 letter is read with the exhibits, the basis for a reasonable concern that an association, "if any," between Judge Chin and Mr. Huang might create actual, or implied bias is clear. Had Judge Chin answered whether there was an association between himself and Mr. Huang, the nature of the association, whether he had followed the media coverage of the FOIA case, then the presence of actual bias and the potential for the appearance of bias could be more readily evaluated.

The Court of Appeals noted:

> The core constitutional obligation of a federal judge is to decide between adversary positions. A judge should be free to carry out that obligation without fear of insulting conduct or statements concerning his or her impartiality and integrity by the attorneys representing the

losing party. A-8.

It went on to find the December 9 letter "was insulting and smacked of intimidation." If such questions are considered insulting, or intimidating, what lawyer will dare question judges concerning bias?

If the Court of Appeals rule means that before attorneys ask questions of a Court to determine whether bias exists they must provide the Court with the factual basis for the questions in detail, it is inviting unnecessary and harmful allegations against judges by lawyers. A lawyer may have a duty to a client to ask such questions of the Judge he most respects. What purpose is served by requiring that a detailed recitation be spread on the record of facts giving probable cause to believe the judge is prejudiced? If the questions are relevant to the issue of bias and have any reasonable basis, they ought to be answered. The facts provided Judge Chin were more than ample to require petitioners to ask the non-accusatory questions they posed. If they are not based on facts known to be false, or asked with reckless disregard of their truth, or are only expressions of opinion, they are protected speech.

If the Court of Appeals is asserting that no relationship between a government official, political fund raiser, influential advisor on judicial appointments and friend of the President and a Judge appointed by the President on the recommendation of that officer can create actual, or implied bias, in a case in which a lawyer has been the principal figure in exposing facts which have created a scandal destroying the career of the official, driving him into hiding and to invoke the Fifth Amendment and damaging, even threatening the Presidency, then public confidence in the judiciary is unprotected from the appearance of bias, and the possibility of actual bias. Human nature instinctively assumes a court might under such circumstances act to protect itself, the President and the benefactor, or act in anger against the lawyer who is the cause for its distress. Will the public believe a Judge ought to sit in a case in which a lawyer is at the very time of the trial engaged in a national scandal implicating the President who

appointed the judge and is destroying the benefactor and friend who only recently brought the Judge to the bench? Such a rule cares little for the bench, the bar, the rights of litigants, or public confidence in the rule of law.

There are many cases in which the Courts of Appeals have considered disciplinary actions based on direct accusations of judicial bias by attorneys or on motions for recusal. Among those with helpful analyses of how the law addresses the "inherently offensive" nature of the subject matter are: In re Cooper, 872 F.2d 1 (1st Cir. 1989); Mackler Productions, Inc. v. Cohen, 1998 U.S.App. LEXIS 13224, No. 97-7789 (June 26, 1998); In re Evans, 801 F.2d 703 (4th Cir. 1986)(relied on the District Court); Hall v. SBA, 695 F.2d 175 (5th Cir. 1983); Standing Committee v. Yagman, 53 F.3d 459 (9th Cir. 1995); and Ritter v. U.S., 540 F.2d 459 (10th Cir.), cert. denied, 429 U.S. 951 (1976)(cited with approval by Justice Kennedy in Liteky v. U.S., 510 U.S. 540, 567 (1994)). We have found no case where discipline was imposed on lawyers for asking questions of a court which were facially neutral and non-accusatory, in order to determine whether they have a duty to seek recusal of a judge, or a new trial because of bias.

There was a solid factual basis for asking the questions to determine whether bias existed, because of the high probability that Judge Chin knew John Huang well and felt indebted to him. Without answers, speculation, both partisan and in the public interest, can be endless concerning such a relationship. Did the Judge participate, or assist in activities of John Huang? Did he know of them? Did he want to damage the lawyer to protect a friend, or conceal his own role? Did John Huang introduce him to his Senators, the President, have dinner with him the night before his Senate hearings? Did he name a son after him? The better rule is to avoid speculation by simply answering questions relevant to the issue of bias.

The very emotion evidenced in the opinions of the courts below and the complete failure to answer, or explain the failure to answer, the questions raised will create the appearance of unfairness in the judiciary and have an intimidating effect on lawyers concerned about potential bias

who ought to seek to assure its absence by inquiry.

II. The Procedures Followed by the District Court In Imposing Sanctions Denied Petitioners Due Process Of Law

The District Court directed petitioners to show cause in writing

> why they should not be sanctioned or otherwise disciplined for violating Disciplinary Rules 1-102(A)(5) ("A lawyer shall not ... [e]ngage in conduct that is prejudicial to the administration of justice.") and/or 7-106(C)(6) ("In appearing as a lawyer before a tribunal, a lawyer shall not... [e]ngage in undignified or discourteous conduct which is degrading to a tribunal.") by their conduct in this case on November 13, 1996 and December 19, 1996 and their letter to the Court dated December 9, 1996. A-5.

In their response to the order to show cause, petitioners noted that if the Court concluded further proceedings were required caselaw which they cited and Local Rule 4 provided a number of different procedural avenues and that since there had been no clear specification of the conduct complained of, further identification of the issues, facts and law involved would be necessary. A-48, A-49. Petitioners suggested referral to another Judge of the Court would be the fairest and most efficient procedure for resolution. A-49.

Judge Chin provided no further specification of the conduct complained of and no hearing, or other opportunity to present evidence in their defense. The Judge Considered many acts of alleged misconduct by petitioners not mentioned in the show cause order and did not refer the matter to another judge. Instead twelve days later he filed a 36 page Order and Opinion holding petitioners' "... engaged in undignified and discourteous conduct that was both degrading to the Court and prejudicial to the administration of justice," and imposing sanctions. A-27.

The Court's action did not provide petitioners an adequate identification of the several matters charged in the order to show cause citing only two court days and a letter. Its subsequent opinion and order went far beyond the parameters of its order to show cause, raising and passing on a number of issues both from the case it tried and other cases that had not been mentioned in the order to show cause.

The matters not mentioned in the show cause order on which the Court passed judgment include entirely irrelevant issues concerning the previous trial judge to whom the case was originally assigned, a previous award of attorney fees against petitioners which was reversed by the Court of Appeals, an action in the U.S. District Court for the Central District of California, and a case before the U.S. Court of International Trade. This was done without notice to appellants or an opportunity for them to be heard. It denied petitioners due process of law and failed to comply with SDNY General Rule 4.

These few instances cited by the Trial Court and referred to by the Court of Appeals represent the only such actions taken against petitioner Klayman in his twenty one years of practice. Petitioner Klayman has only once moved to recuse a judge in his years of practice. Petitioner Orfanedes has never been sanctioned, or otherwise disciplined in eight years of practice, and has never moved to recuse a judge.

Not only did petitioners have no notice whatsoever that these issues would be raised -- and thus had no chance to respond -- but it is apparent from the Opinion itself that the trial judge improperly disciplined petitioners for unrelated and irrelevant acts of purported misconduct not before him. The trial court then used these unrelated and irrelevant instances of prior, purported misconduct to bolster his charges and relied on them to distinguish In re Snyder, 472 U.S. 634, 647 (1985), which reversed a disciplinary action taken against an attorney after finding that "a single incident of rudeness or lack of professional courtesy. . . does not support a finding of contemptuous conduct, or a finding that a lawyer is 'not presently fit to practice law in the federal courts.'" In Snyder

the trial court was only addressing the conduct before it. It could not do otherwise, at least without providing notice and a chance to defend.

The inadequacy of the notice given by the order to show cause is also demonstrated by the fact that many of the alleged shortcomings in petitioner's conduct the Court apparently perceived to be self evident, since it did not identify them, were in fact obscure until the Court cited them for the first time in its opinion and order of February 5, 1997. In that opinion the Court took exception never made before to the closing phraseology in petitioners' letter of December 9, thanking the Court "for its immediate attention to this matter," which he found disrespectful despite the reference to the time limit for post trial motions. The Court raised in its opinion for the first time objections to petitioner's use of the phrase soul searching and reference to canons of judicial ethics.

This Court has long recognized the right to due process in attorney disciplinary matters. As was said in Ex Parte Robinson, 19 Wall. 513, 22 L.Ed. 205 (1873) with respect to disbarment:

> Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. And such has been the general, if not the uniform, practice of the courts of this country and of England....The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged. (Citations omitted).

More recently, Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980), confirmed the need for adherence to due process in the imposition of sanctions in ruling that federal courts have the inherent power to impose attorney fees as sanctions, stating:

> Like other sanctions, attorney's fees should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.

Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) reiterated the need for due process:

> A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandate of due process, both in determining that the requisite bad faith exists and in assessing fees, see Roadway Express, supra at 767.

See also, NCAA v. Tarkanian, 488 U.S. 179, 192 (1988) which held the imposition of a serious disciplinary sanction upon a tenured employee of a state university must comply with the terms of the Due Process Clause of the Fourteenth Amendment.

Fairness as well as Rule 4(f) required at a minimum that all conduct the Court was charging to be violative of disciplinary rules be specified in the order to show cause, as it readily could have been, including the designation of the offensive words themselves, and not just citations to a day, or a letter: "conduct in this case on November 13, 1996 and December 19, 1996 and their letter to the Court dated December 9, 1996."

There is a another basic problem with the procedure followed below. The District Court chose to deal with this matter itself invoking General Rule 4(k). General Rule 4 establishes a committee on grievances -- a committee of judges that shall have charge of all matters relating to discipline of attorneys. It provides for a committee of attorneys to assist the

committee on grievances -- to investigate complaints and serve as members of hearing panels. Rule 4(k) gives the District Court the option of bypassing this procedure and dealing directly with "Misconduct of any attorney in the presence of this court or in any manner in respect to any matter pending in this court."

It was not proper for the Court to choose, as it did, to deal directly with this matter. A-24. Judge Chin relied on conduct outside the presence of the court and on words alone, words that addressed emotional issues touching on matters of public importance and concern. The District Court's conduct of the bench trial was raised by petitioners as a part of their basis for writing the December 9 letter. It caused them concern about the Court's impartiality. See, A-44, A-45. It should have been clear to the Court, if not when it issued its order to show cause, then at the latest after considering petitioners letter response and as the Court worked on its opinion and order and expanded the matter to include appellants' unrelated and irrelevant "history," that this was the kind of matter which must be handled by a different judge, and not the judge whose conduct, relationships and role were directly in question, who had expressed such deep offense and whose order could be seen as retaliation against petitioners for making an always unpleasant inquiry concerning potential bias of a judge. The District Court should have referred this matter to a different judge, or to the grievance committee where it would appear to be objectively assessed by other judges and by practicing attorneys.

Because this case is closely related to the continuing investigations and notoriety of AsiaGate/IndoGate, to John Huang, who raised $1.6 million which the DNC later returned to contributors, to illegal foreign political contributions and the need for campaign fiance reform, it will be subject to public debate and scrutiny for years to come. The public record shows John Huang was instrumental in securing appointments for Asian-Americans he knew personally. According to press reports published before Judge Chin's decision, Mr. Huang met with a Philippine-American associate who was appointed director of the Export-Import Bank on June 23, 1994, the day

after she was sworn in, with James T. Riady whose involvement with the Clinton Administration was a key part of the IndoGate investigations. See, Los Angeles Times, Records Show Visits To Exin Bank Director, January 29, 1997. Public confidence in the bench, the bar and the rule of law will be affected by its final resolution.

The case will make a lasting impression on judges and lawyers because of its association with political scandal, its notoriety, the strong language of the reported decisions of the District Court and the Court of Appeals, the facial neutrality of the questions asked, the Court's hypersensitive reaction to, and misinterpretation of, the mention of race, the failure of the Court to respond to the questions including whether it knew John Huang, the failure to provide adequate notice of the conduct charged, the inclusion in the judgment of acts not mentioned in the show cause order, the violation of Local Rule 4, and the important Due Process and First Amendment issues.

In addition, the issues in this case will radiate out to the many jurisdictions and courts in which petitioners are admitted to practice, to the cases in which they are now admitted pro hac vice and in the courts to which they may seek admission in the future. Two state grievance committees have already contacted petitioners following receipt of Judge Chin's order.

Petitioners have a nationwide and international practice. They are admitted to practice in four states, the District of Columbia and many federal courts, including this Court. They have been and are presently admitted pro hac vice in many other federal and state courts. In many instances depending on the applicable rules, petitioners will be under a duty to report Judge Chin's order to these courts.

Each court and disciplinary body that receives Judge Chin's order must decide what, if anything, to do about it. If it does anything, it must decide what opportunity petitioners shall be given to dispute the order and its factual and legal basis, including petitioners' entitlement to an evidentiary hearing. The rules of the Court may deny or limit petitioners'

opportunity to be heard. If the rules are discretionary, the opportunity may depend on the assessment by each grievance committee whether, and to what extent, the order is the product of an unfair or flawed process.

The exercise by this Court of its supervisory powers in this case will provide a valuable opportunity for the resolution and clarification of the several vital and recurrent issues it raises and to effect much needed improvements in the disciplinary rules for lawyers in the future, reducing unfairness and wasteful expenditure of judicial and disciplinary resources.

The failure of the District Court to provide petitioners a hearing, or some opportunity to present facts in defense of their conduct and to refer the case to another judge, or a grievance committee creates an additional concern for the appearance of fairness. The same judge that overreacted to questions then failed to answer them denied due process of law in punishing his questioners. The questions were asked to determine whether there might be bias arising from an association, if any, between Judge Chin and John Huang. Judge Chin cut off petitioners' opportunity to obtain and present evidence in a public hearing through compulsory process and other judicially enforced rights to determine whether the questions were proper. Another judge might have asked Judge Chin to respond to the questions posed.

III. The Sanctions Imposed Punish Protected Speech

"At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." Gentile v. State Bar of Nevada, 501 U.S. 1030 at 1054 (1991).

The decision below, while not mentioning the First Amendment issue though it was briefed and argued by petitioner, assumed that attorneys can be punished for speech that states, or implies by questions, that a Judge may be biased. The assumption is contrary to the Constitution and the cases of this Court. It would, at the very least, destroy discussion of

impartiality of judges by those who most regularly witness their performance and the benefits the First Amendment assumes may flow from public discussion. See, Craig v. Harney, 331 U.S. 367, 395 (1947) which reversed a contempt order against a newspaper for an editorial critical of a judge for setting aside a jury verdict, holding "strong language, intemperate language" and "unfair criticism" of judges is protected by the First Amendment. This decision will have a chilling effect on the duty of lawyers to speak in order to protect clients from judicial bias and will create the public impression that the Courts will punish free speech when it appears to question their impartiality.

There are only a few exceptions to First Amendment protection of attorneys' speech about courts, or judges. If attorneys make statements of fact that charge, or imply, a judge is biased, knowing the statements to be false, or with reckless disregard for their truth, they may be sued. New York Times v. Sullivan, 376 U.S. 254 (1964). The statements of fact made by petitioner were true and are unchallenged. Truth is an absolute defense.

Statements, and their implications, that are expressions of opinion are also entitled to absolute protection. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Allman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985). While a substantial factual basis was asserted by petitioners supporting the questions they asked by letter, the questions, at most, only implied an opinion that bias, or at least grounds for recusal, might exist.

Gentile v. State Bar of Nevada, supra, in the plurality opinion by Justice Kennedy, recognizes that where an attorney's speech creates a risk of substantially prejudicing a specific trial proceeding, disciplinary powers may be exercised. There has been, and could be, no claim that the speech here could have such an effect. The speech was either in open court in a bench trial and not addressed by the judge at the time, or in a letter to the judge in chambers after judgment had been entered.

The decision below sub silentio, since by silence it rejects the First Amendment claim, conflicts with the Ninth Circuit decision in Standing Committee v. Yagman, 53 F.3d 1430 (9th Cir. 1995).

Punishment of a lawyer for speech which, by asking questions, may be considered to have implied a judge might be biased, undermines confidence in a judiciary which approves the punishment for such criticism of itself by those who ought to know it best, despite First Amendment protection that permits such criticism of everyone except judges.

Conclusion

The Opinions and Decisions of the District Court and the Court of Appeals do great harm to the legal profession and our system of justice as a whole. If allowed to stand, they will have a far-reaching chilling effect on the willingness of lawyers to protect their clients from the potential of judicial bias. A lawyer must not be inhibited from asking questions discreetly that may confirm or refute a trial judge's actual bias or the appearance of such a bias, where there is a reasonable basis to do so. The right of a lawyer to raise even sensitive issues is necessary to insure fair trials and the integrity of our system of justice. Review and reversal are necessary to protect these vital interests.

Dated: July 14, 1998

Ramsey Clark
Lawrence w. Schilling
36 E. 12th Street
New York, NY 10003
(212) 475-3232

Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

May 15, 1997, Argued February 18, 1998, Decided

Docket No. 97-7193

MacDRAW, INC., Plaintiff, KLAYMAN AND ASSOCIATES, P.C., LARRY KLAYMAN and PAUL J. ORFANEDES,
Appellants,

v.

CIT GROUP EQUIPMENT FINANCING, INC. and RICHARD JOHNSTON,
Defendants-Appellees.

Before: WINTER, Chief Judge, ALTIMARI, and CABRANES, Circuit Judges.

Appeal from a judgment in the United States District Court for the Southern District of New York (Denny Chin, Judge) imposing sanctions on attorneys who called the district judge's impartiality into question based on his appointment by the Clinton Administration and on his race and ethnicity.

We affirm.

COUNSEL: RAMSEY CLARK (Lawrence W. Schilling, of counsel), New York, New York, for Appellants.

WINTER, Chief Judge:

Attorneys Larry Klayman and Paul J. Orfanedes appeal from Judge Chin's imposition of sanctions pursuant to then General Rule 4[1] of the Local Rules for the Southern District of New

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[1] Rule 4 was in effect at the time of Judge Chin's order and governs this appeal. We note, however, that Local Rule 4 has recently been replaced by Local Civil Rule 1.5, effective as of April 15, 1997. See NY Order 97-10.

York. Judge Chin imposed the sanctions because Klayman and Orfanedes called into question his impartiality based on his having been appointed by the Clinton Administration and on his race and ethnicity. Judge Chin's imposition of sanctions was well within his discretion. We therefore affirm.

BACKGROUND

Klayman and Orfanedes represented MacDraw, Inc., an importer and seller of wire-drawing equipment, in this action against CIT Group Equipment Financing, Inc. ("CIT"). The case arose from a dispute over CIT's financing of a sale of equipment by MacDraw to Laribee Wire Manufacturing Company, Inc. The action was assigned to Judge Kram when it was commenced in August 1991.

In the fall of 1991, Klayman moved for partial summary judgment on behalf of MacDraw. Judge Kram had discouraged Klayman from filing such a motion because she perceived that the existence of an oral promise was a dispositive issue in the case and necessarily involved a dispute of fact precluding summary judgment. In April 1992, Klayman, having failed to make a timely demand for a jury trial, also moved for an order granting trial by jury. One month later, Klayman wrote a letter to Judge Kram requesting leave to file a motion for recusal on the ground that the court "has prejudged the case against the plaintiff." Judge Kram directed the parties to submit a briefing schedule for a recusal motion, but no such motion was ever filed.

In January 1994, Judge Kram issued an order that, inter alia, denied Klayman's request for summary judgment and a jury trial and granted defendants' cross-motion for monetary sanctions. MacDraw, Inc. v. CIT Group Equip. Fin., Inc., 1994 WL 17952 (S.D.N.Y. Jan. 18, 1994). Klayman appealed from the imposition of sanctions, and we reversed. MacDraw, Inc. v. CIT Group Equip. Fin., Inc., 73 F.3d 1253 (2d Cir. 1996). However, we specifically did not hold that Klayman's conduct was not sanctionable. Rather, we held only that the identification of such conduct by the district court was not sufficiently specific. Id. at 1261-62. Moreover, we expressed doubt as to the merits of one of MacDraw's major claims. Id. at 1260. Finally, we noted:

Our discussion should not be taken to suggest that we find the conduct of plaintiff's counsel throughout this litigation to be acceptable. Indeed, we note our sympathy with the district court's frustration; in pursuing this appeal, plaintiff's counsel submitted briefs that included inaccurate characterizations of the record and comments that we consider entirely inappropriate. Id. at 1262.

The case was thereafter reassigned to Judge Chin. On November 13, 1996, during the bench trial and in open court, Judge Chin rendered a credibility decision on a dispositive issue and granted judgment for appellees pursuant to Fed.R.Civ.P. 52(c). Klayman then initiated an argumentative colloquy with the court in which he challenged the merits of its decision. Claiming that his client could not understand the use of Rule 52(c) to grant judgment on a dispositive issue during a trial, Klayman asked the court to "explain" the procedure to his client. Judge Chin declined to do so, and, unpersuaded by Klayman's attempts to reargue the legal questions just decided, brought the proceeding to a close.

On December 9, 1996, Judge Chin received a letter from Klayman and Orfanedes that stated in part:

> Finally, as you may know, Mr. Orfanedes and I have been involved in very highly publicized and significant public interest litigation, Judicial Watch, Inc. v. U.S. Department of Commerce, Case No. 95-0133 (RCL) (D.D.C.), which involves a Mr. John Huang, Ms. Melinda Yee and other persons in the Asian and Asian-American communities. See Exhibit 1. Recently, we came upon a document in this case which mentions your name in the context of other prominent Asian-American appointees of the Clinton Administration. See Exhibit 2. Accordingly, could you please formally advise us whether you know either of these individuals, as well as what relationship, contacts, and/or business, political or personal dealings, if any, you have had with them, or persons related in any way to the Clinton Administration. Please also advise us if you had seen the enclosed or similar newspaper articles or press accounts

> before this case was tried on November 6, 7, 12 and 13, 1996.

Klayman and Orfanedes attached, as Exhibit 1, seven newspaper and magazine articles reporting on a major political controversy over campaign contributions involving John Huang and the Democratic National Committee. Some of the articles mentioned Klayman as a member of Judicial Watch, an organization participating in a lawsuit against Huang in California. Exhibit 2 to the letter was a computer-generated print-out of an article that had appeared in AsianWeek more than two years before. The article discussed the Democratic Party's courting of Asian-American voters and noted that part of this effort involved appointing Asian-Americans to high-profile positions. It then listed six Asian-American presidential appointees, including Huang and Judge Chin. The article did not suggest any connection between the two, other than their having been appointed by the same administration and their being Asian-American.

On December 19, 1996, Judge Chin held a conference in open court and asked Klayman and Orfanedes to explain on the record the basis for the above-quoted letter. Klayman responded that Judge Chin had made negative remarks about the merits of MacDraw's case and appellants' conduct in litigating it and had indicated at the conclusion of the trial that post-trial motions would be futile. Klayman also indicated that his involvement in the California lawsuit, which implicated John Huang in the ongoing campaign-financing controversy involving the Clinton presidential campaign, may have caused Judge Chin to lose his impartiality in the present case, because both Huang and Judge Chin were Clinton appointees and Asian-Americans. When Judge Chin asked Klayman if he posed the questions in the December 9 letter because of Judge Chin's race, Klayman conceded that he had:

> THE COURT: You are conceding that [in the December 9 letter] you asked questions of the court, at least in part, because of my race?
> MR. KLAYMAN: In part. And let me tell you why. And I would [have] asked questions because you're also a recent appointee of the Clinton Administration. Has nothing to do with it. But you have been active, your Honor, for

> instance, in these kinds of efforts. And I commend you for your activity on behalf of the Asian-Americans, with regard to the Asian-American Legal Defense Fund and being a president of the Asian-American Bar Association. I myself have been active in similar types of things and am fully supportive of those activities.
>
> But we are all human, and sometimes, sometimes subjective criteria can unwittingly, no matter how ethical, no matter how decent, no matter how honest someone is -- and we believe you to be that -- they can subjectively influence our decision-making. I, for instance, would not sit as a Jewish American on a case that involved a Palestinian. I wouldn't do it if I was a judicial officer just because of a lot of things which enter into the subjectivity of all our thinking.

Mr. Orfanedes spoke briefly and stated that he did not "see this as necessarily race-based." Speaking again, Mr. Klayman advised Judge Chin as follows:

> [MR. KLAYMAN:] Now, I believe your Honor has to search his own soul to a large extent. There may be independent legal requirements here on whether or not you wish to advise this court of some of the questions which we asked, which are benign, which were posed in a very respectful way. We ask this letter be made part of the court record.
>
> THE COURT: The letter has already been docketed. I am not going to search my soul. I do not need to do any soul searching at all. The letter is offensive. I find the letter to be offensive. I do not think it is benign nor do I think it is respectful. Not at all.

Judge Chin thereafter ordered Klayman and Orfanedes to show cause why they should not be sanctioned or disciplined pursuant to Local Rule 4 for violating Disciplinary Rules 1-102(A)(5) and 7-106(C)(6) of the Code of Professional Responsibility, N.Y. Jud. Law App. Disciplinary Rule 1-102(A)(5) provides that a lawyer "shall not . . . engage in

conduct that is prejudicial to the administration of justice." Disciplinary Rule 7-106(C)(6) provides that, "in appearing as a lawyer before a tribunal, a lawyer shall not . . . engage in undignified or discourteous conduct which is degrading to a tribunal."

Klayman and Orfanedes submitted a letter brief arguing that their conduct was not degrading and did not prejudice the administration of justice. The letter insisted that Klayman and Orfanedes acted reasonably because Klayman's participation in a case that "elicited such angry responses from the White House, Democrats and the Asian-American community [may have caused] the Court [to] be angry at them and unable to be fair and impartial in a case in which they were counsel."

On February 5, 1997, Judge Chin imposed sanctions on Klayman and Orfanedes for violating Disciplinary Rules 1-102(A)(5) and 7-106(C)(6). The sanctions consisted of: (i) revoking appellants' pro hac vice status; (ii) denying any future applications by Klayman or Orfanedes to appear before Judge Chin on a pro hac vice basis; and (iii) ordering Klayman and Orfanedes to provide a copy of Judge Chin's opinion imposing sanctions to any other judge in the Southern District of New York to whom they may apply for pro hac vice status in the future.

DISCUSSION

We review the imposition of sanctions under Local Rule 4 for abuse of discretion, see In re Gouiran, 58 F.3d 54, 56 (2d Cir. 1995); In re Jacobs, 44 F.3d 84, 87-88 (2d Cir. 1994).

Local Rule 4 authorizes the disciplining of attorneys if, after notice and opportunity to be heard, they are found by clear and convincing evidence to have violated the Code of Professional Responsibility. See Local Rule 4(f). In the case of attorneys who are admitted pro hac vice, Local Rule 4 authorizes sanctions that include the precluding of the attorney from appearing at the bar of the court. See Local Rule 4(g). Local Rule 4(k) states that where the conduct at issue occurred in the presence of a judge or with respect to any matter pending before the court, the matter "may be dealt with directly by the judge in charge of the matter or at said judge's

option referred to the committee on grievances, or both.[2]

We find no error in the sanctioning of Klayman and Orfanedes, much less an abuse of discretion. The December 9 letter posed interrogatories to the district judge strongly implying that he was not impartial based solely on his appointment by the Clinton Administration and on his being Asian-American. The subsequent hearing and briefing on the imposition of sanctions demonstrated that precisely such a suggestion was being made. Oral argument in this court confirmed that such was the purpose of the December 9 letter.

The fact that a political controversy may be perceived by some as involving racial or ethnic aspects is not grounds for questioning in an entirely separate matter the impartiality of a judge of that race or ethnicity toward attorneys who are also involved in the controversy. Courts have repeatedly held that matters such as race or ethnicity are improper bases for challenging a judge's impartiality. See United States v. El-Gabrowny, 844 F. Supp. 955, 961-62 (S.D.N.Y. 1994) (refusing to answer questions posed regarding judge's religious affiliation and connection, if any, to Israel); Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) (sex or race is improper basis for recusal); see also Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 163 (E.D. Pa. 1974). A suggestion that a judge cannot administer the law fairly because of the judge's racial and ethnic heritage is extremely serious and should not be made without a factual foundation going well beyond the judge's membership in a particular racial or ethnic group. Such an accusation is a charge that the judge is racially or ethnically biased and is violating the judge's oath of office.

Nor should one charge that a judge is not impartial solely because an attorney is embroiled in a controversy with the administration that appointed the judge. Judges generally have political backgrounds to one degree or another but must be presumed, absent more, to be impartial. At least in the federal system, judges separate themselves from politics when going on the bench, and their life tenure reduces any felt reliance on

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[2] New Local Rule 1.5 omits the language of Local Rule 4 that allows the district court, rather than the grievance committee, to impose sanctions.

political patrons. Indeed, a suggestion of partiality based on the appointing administration may often be a double-edged sword. If a Democratic appointee's impartiality toward lawyers publicly identified as active Republicans may be questioned, a Republican appointee's impartiality toward lawyers' adversaries might similarly be questioned on the ground that a Republican judge might favor the Republican lawyers. Finally, appointment by a particular administration and membership in a particular racial or ethnic group are in combination not grounds for questioning a judge's impartiality. Zero plus zero is zero.

We do not hesitate to hold that the suggestions regarding Judge Chin's impartiality violated the Code of Professional Responsibility. There is no factual basis for the suggestions made in the December 9 letter other than Judge Chin's appointment by the Clinton Administration and his race and ethnicity. Appellants, having suggested, but not having moved for, Judge Kram's recusal because of her perceived (by appellants) "prejudgment," found their desire for a new judge satisfied and proceeded to trial. Appellants correctly note that Judge Chin did express negative concerns about the merits of MacDraw's case and the conduct of appellants in litigating it. However, such remarks are common and often important to a trial court's administration of a case. Although they may occasionally wound counsel's pride, they can be informative and helpful to counsel who are not hypersensitive. Although it is not necessary to our disposition of this appeal, we note that the panel hearing the previous appeal made analogous comments, describing one of MacDraw's claims as "troubling" and Klayman's brief as containing "inaccurate characterizations of the record and comments that we consider entirely inappropriate." 73 F.3d at 1260, 1262.

Because the suggestions in the December 9 letter entailed claims of partisan and racial bias with no factual basis, such charges were "discourteous" and "degrading" to the court. Disciplinary Rule 7-106(C)(6). They were also "prejudicial to the administration of justice." Disciplinary Rule 1-102(A)(5). The core constitutional obligation of a federal judge is to decide between adversary positions. A judge should be free to carry out that obligation without fear of insulting conduct or statements concerning his or her impartiality and integrity by the attorneys representing the losing party. Of course,

professional advocates may lose perspective regarding the strengths or weaknesses of their case and find it difficult to conceal their feelings about an adverse decision immediately upon learning of it. Some tolerance must be shown by a court in such circumstances, as it was here, when Klayman exhibited pique in open court at the time of the adverse Rule 52(c) ruling. The December 9 letter came almost a month later, however. It was insulting and smacked of intimidation. Judge Chin was in no way required to tolerate it.

Nor were the sanctions imposed by Judge Chin excessive. In a similar situation, the Fourth Circuit affirmed the imposition of much harsher sanctions where the district court disbarred an attorney who accused a magistrate judge of having a "Jewish bias" in favor of the adversary. In re Evans, 801 F.2d 703, 704-06 (4th Cir. 1986) (conduct violated DR 1-102(A)(5), 7-106(C)(6) and 8-102(B) and was "unquestionably undignified, discourteous, and degrading").[3]

Judge Chin therefore acted well within his discretion in imposing sanctions on Klayman and Orfanedes, and we affirm.

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[3] Klayman has had his ability to appear pro hac vice revoked before. In the Central District of California, Klayman received the sanction for making misrepresentations to the court and for engaging in dilatory conduct. See Baldwin Hardware Corp. v. Franksu Enter. Corp., 78 F.3d 550, 555, 562 (Fed. Cir.), cert. denied, 117 S. Ct. 360 (1996). Disturbingly, Klayman on appeal accused the district judge of being anti-Asian and anti-Semitic. 78 F.3d at 555. The Federal Circuit affirmed the sanctions. Id. at 561-62. Although the Federal Circuit stated that Klayman never presented the issue of ethnic or racial bias to the district judge directly, id. at 557 & n.4, Klayman admitted to Judge Chin that his sanctions in Baldwin resulted from his accusing the district judge of being anti-Asian.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

MACDRAW, INC.,

Plaintiff,

- against -

OPINION AND ORDER
91 Civ. 5153 (DC)

THE CIT GROUP EQUIPMENT FINANCING, INC.
and RICHARD JOHNSTON,

Defendants.

APPEARANCES:
RAMSEY CLARK, Esq., LAWRENCE W. SCHILLING, Esq. Attorneys for Larry Klayman, Esq. and Paul J. Orfanedes, Esq.
36 East 12th Street
New York, New York 10003

LARRY KLAYMAN, Esq., PAUL J. ORFANEDES, Esq., Klayman & Associates, P.C., Washington, D.C.,
Attorneys for Plaintiff
501 School Street, S.W., Suite 700
Washington, D.C. 20024

SUSAN G. ROSENTHAL, Esq., JEFFREY H. WEINBERGER, Esq., Winick & Rich, P.C.,
Attorneys for Defendants
919 Third Avenue
New York, New York, 10022

CHIN, D.J

In this case, I find myself in the position of having my fairness and impartiality as a judge called into question because of my race. After I ruled against their client at trial, respondents Larry Klayman, Esq. and Paul J. Orfanedes, Esq. directed a series of questions to me inquiring (1) whether I knew John Huang and Melinda Yee, individuals involved in the recent campaign finance controversy, and (2) whether I

had had any "business, political or personal dealings" with them or any other "persons related in any way to the Clinton Administration." Respondents have since conceded on the record in open court that the questions were asked of me in part because of my race:

> THE COURT: You are standing there and you are telling me that you did not ask these questions of me because I am Asian-American, is that what you are telling me?
> MR. KLAYMAN: I'm saying that is part of it.
> THE COURT: You are conceding that that is part of it?
> MR. KLAYMAN: Part of it, yes. And I'm also asking the questions --
> THE COURT: You are conceding that you asked questions of the court, at least in part, because of my race?
> MR. KLAYMAN: In part. . . .

(12/19/96 Tr. at 8).

Respondents had absolutely no basis for posing such questions to the Court. Moreover, Mr. Klayman has engaged in other conduct disrespectful of the Court. For example, in the same hearing, after purporting to advise me of my obligations under the canons of judicial ethics, Mr. Klayman suggested that I "search [my] own soul." (12/19/96 Tr. at 14, 16).

Messrs. Klayman and Orfanedes are not members of the Bar of this Court. Rather, they were both granted the privilege of appearing pro hac vice.[1] Because of their conduct in this case, I issued an order directing them to show cause why they should not be sanctioned or disciplined for violating Disciplinary Rules 1-102(A)(5) and 7-106(C)(6). They retained counsel, who filed a written response on their behalf.

Having reviewed the response as well as all the relevant parts of the record, and for the reasons set forth below, I find that respondents Larry Klayman, Esq. and Paul J. Orfanedes, Esq. have violated Disciplinary Rules 1-102(A)(5) and

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[1] Mr. Klayman was admitted pro hac vice in November 1991 by Judge Kram and Mr. Orfanedes was admitted pro hac vice by me in November 1996.

7-106(C)(6). Consequently, they are disciplined as follows: (1) their admissions pro hac vice are hereby revoked; (2) any future applications by Messrs. Klayman and Orfanedes to appear before me on a pro hac vice basis will be denied; and (3) Messrs. Klayman and Orfanedes are hereby ordered to provide a copy of this opinion to any other judge in this District to whom they may make an application for admission pro hac vice in the future.

STATEMENT OF THE CASE

A. The Underlying Facts

Plaintiff Macdraw, Inc. ("Macdraw")[2] imports and sells wire-drawing equipment. In 1989, it agreed to sell certain equipment to Laribee Wire Manufacturing Company, Inc. ("Laribee") for a purchase price of approximately $ 7.1 million, to be paid in four installments. Because of the size of the transaction, Laribee approached defendant CIT Group Equipment Financing, Inc. ("CIT") for financing. CIT agreed to provide financing in return for a security interest in the equipment. Laribee was required, under the terms of the agreement, to meet certain conditions on a continuing basis. One such condition was that Laribee not be in default on any loans with other financial institutions.

Eventually, all of the equipment was delivered by Macdraw to Laribee. Consequently, CIT made the first three of the four payments under the financing agreement directly to Macdraw, as instructed by Laribee, leaving only the fourth and final installment -- some $ 711,000 -- to be paid. In November 1990, Laribee acknowledged to CIT that it had "accepted" the equipment, clearing the way, from Macdraw's point of view, for the final payment. As CIT began processing the fourth installment, however, it learned that Laribee had defaulted on a loan with Bankers Trust. As a consequence, Laribee was in default under the financing agreement with CIT and CIT refused to release the final $ 711,000 to Macdraw. Laribee was not able to make the final payment itself. Hence,

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[2] Macdraw is now known as Samp U.S.A (Trial Tr. at 23), but for ease of reference I will simply refer to it as Macdraw.

Macdraw was never paid the final $ 711,000.

B. Prior Proceedings

Macdraw commenced this action against CIT in August 1991, asserting five causes of action. Laribee was not named because it had filed for bankruptcy. Notwithstanding Laribee's inability to comply with the terms of its financing agreement with CIT, Macdraw contends that CIT was required to make the final $ 711,000 payment on Laribee's behalf because (1) defendant Richard Johnston purportedly made certain promises on CIT's behalf, and (2) CIT purportedly failed to disclose to Macdraw that Laribee was in default and encountering financial problems. CIT denied the allegations.

In the fall of 1991, respondent Klayman advised the Court (Kram, D.J.) of his intention to move, on behalf of Macdraw, for summary judgment. Judge Kram sought to discourage Mr. Klayman from filing such a motion, to no avail, for in March 1992 Macdraw moved for partial summary judgment. On April 14, 1992, having failed to demand a jury trial on a timely basis, Macdraw also filed a motion for an order granting it a jury trial. Defendants thereafter cross-moved for summary judgment dismissing the complaint and seeking sanctions for Macdraw's purportedly frivolous motion practice.

By Memorandum Opinion and Order docketed January 18, 1994, Judge Kram: (1) denied plaintiff's motion for partial summary judgment; (2) denied plaintiff's request for a jury trial; (3) granted defendants' cross-motion to dismiss with respect to three of the five counts (leaving only the fraud and promissory estoppel claims for trial); and (4) granted defendants' cross-motion for sanctions. Macdraw, Inc. v. CIT Group Equip. Fin., Inc., 1994 WL 17952 (S.D.N.Y. Jan. 18, 1994). Among other things, Judge Kram concluded "it is apparent that 'plaintiff's counsel engaged in little or no preliminary factual and legal investigation' before bringing its motion." Id. at *20 (quoting Wrenn v. New York City Health & Hospitals Corp., 104 F.R.D. 553, 559 (S.D.N.Y. 1985)). The Court imposed sanctions under Rule 11, which Macdraw's attorneys were ordered to pay.

At an earlier point in the proceedings, Mr. Klayman wrote the Court a letter requesting leave to file a motion for

voluntary recusal, pursuant to 28 U.S.C. @ 455(a), on the ground that "the Court 'has prejudged the case against the plaintiff.'" Id. at *20 (quoting Letter to Hon. Shirley Wohl Kram from Larry Klayman of 5/14/92). Judge Kram reminded the parties that the Court had the power to impose sanctions for bad faith, vexatious, wanton, or oppressive conduct and directed the parties to submit proposed briefing schedule for a recusal motion. Id. at *20. No such motion, however, was ever filed.

On January 5, 1995, Macdraw, Klayman, and Klayman's firm (Klayman & Associates) appealed the imposition of sanctions to the Second Circuit. In an opinion dated January 3, 1996, the Second Circuit reversed the award of sanctions. Macdraw, Inc. v. CIT Group Equip. Fin., Inc., 73 F.3d 1253 (2d Cir. 1996). In doing so, however, the Second Circuit noted:

> Our discussion should not be taken to suggest that we find the conduct of plaintiff's counsel throughout this litigation to be acceptable. Indeed, we note our sympathy with the district court's frustration; in pursuing this appeal, plaintiff's counsel submitted briefs that included inaccurate characterizations of the record and comments that we consider entirely inappropriate. There is no question that our rules permit sanctions where an attorney's conduct degrades the legal profession and disserves justice. In the face of significant abuse, a district court need not hesitate to impose penalties for unreasonable conduct and acts of bad faith. Nevertheless, it must do so with care, specificity, and attention to the sources of its power. . . .

Id. at 1262.

While the appeal of the sanctions award was pending in the Second Circuit, Macdraw filed a "renewed motion" for a jury trial in the District Court. In the motion papers, signed by respondents Klayman and Orfanedes, respondents wrote:

> Macdraw respectfully submits that the Court has demonstrated perhaps an unintentional, yet readily apparent, predisposition against its

> claims. As set forth below, the record in this matter raises legitimate cause for concern. In order to alleviate any such concern, and avoid even the appearance of judicial predisposition, Macdraw respectfully requests that the Court allow a jury trial so as to safeguard Macdraw's rights. . . .

(Pl. Mem. in Support of Renewed Motion for Jury Trial at 1). That motion was denied by Judge Kram on July 31, 1995. Thereafter, Macdraw filed with the Second Circuit a petition for a writ of mandamus directing the District Court to grant Macdraw a jury trial, which the Second Circuit denied on October 3, 1995.

By letter to Judge Kram dated October 30, 1995, Macdraw requested a stay of the case pending the filing of a petition for a writ of certiorari to the Supreme Court on the issue of Macdraw's right to a jury trial. On November 2, 1995, Judge Kram granted the application and the case was stayed pending the filing by Macdraw of a petition for certiorari.

On November 6, 1995, the case was re-assigned to me. Although it is not clear from the record whether Macdraw ever filed a petition for a writ of certiorari with the Supreme Court, in the summer of 1996 Macdraw advised the Court that it was prepared to proceed to trial without a jury. I conferenced the case on September 3, 1996, at which time I directed the parties to be ready for trial in November 1996.

C. The Trial

After the submission of detailed trial briefs, the case was tried to the Court without a jury on November 6, 7, 12, and 13, 1996. Macdraw's principal witness was its president, Massimo Colella. After Macdraw rested, defendants moved for judgment as a matter of law and I reserved decision. (Trial Tr. at 302). Defendants proceeded to call two witnesses, including defendant Richard Johnston. At that point defendants renewed their motion for judgment as a matter of law, without resting. (Trial Tr. at 416). On November 12, 1996, I adjourned the trial so that I could complete my reading of the depositions before ruling on defendants' motion. (Id. at 425-33).

On November 13, 1996, I granted defendants' motion for judgment as a matter of law. Pursuant to Rule 52(c), I made findings of fact and conclusions of law. (Trial Tr. at 436-45). My decision turned largely on my credibility findings. Having heard both Johnston and Colella testify, and having reviewed all the evidence in the case, I found Johnston to be more credible than Colella. I accepted Johnston's testimony that he never made the alleged oral promises and I rejected Colella's testimony to the contrary. (Id. at 439-42). I also found that Macdraw could not have reasonably believed that CIT would commit to disbursing $711,000 in additional financing without assuring itself that Laribee was still in sound financial condition. (Id. at 444).

D. Respondents' Conduct

Three aspects of respondents' conduct, taken together, led me to issue the order to show cause. They are: (1) comments made by Mr. Klayman at the conclusion of trial on November 13, 1996; (2) the questions contained in a letter dated December 9, 1996, signed by both Messrs. Klayman and Orfanedes; and (3) comments made by Mr. Klayman at a conference I held on December 13, 1996, after receiving the December 9th letter. I will review each in detail.

1. The November 13, 1996 Comments

After I stated my findings and conclusions at the conclusion of the trial on November 13, 1996, Mr. Klayman expressed a desire to make post-trial motions. A colloquy with the Court ensued (Trial Tr. at 445-52), concluding with the following:

> [THE COURT TO MR. KLAYMAN:] I am not going to debate this with you. I have ruled....
>
> I really don't think any additional motions are really going to help. All I am suggesting to you is that I think your view of the evidence is very different from my view of the evidence and that's fine. You have to do your job. If you want to make any motions, go ahead and make your motions, but I am not going to require

any responses from CIT until I look at the motions first.

MR. KLAYMAN: Your Honor, I understand your position and I understand you have denied the motions. We will simply file a notice of appeal. But I had to say that for the record. We are not here 6 years later because we wanted to be. You are newly appointed to the bench, we are aware of the fact that you did speed this case to trial. We hope in the future this court functions better because frankly it has not functioned well --

THE COURT: Mr. Klayman, that is totally out of line. I don't know what you are doing now. I have no history with you. MR. KLAYMAN: What I am telling you is, you criticized us for being 6 years later into this case and I am pointing out that we would have liked to have tried this case a lot sooner, period. I'm not trying to embarrass you or anybody else.

THE COURT: Believe me, you are not embarrassing me. This case is five or six years old for whatever the reason. When it came to me I moved it very quickly. Your client got his day in court. That's it. For you to stand there and criticize the court gets you nowhere. I just don't understand why you are doing that. How does it help you to stand there and criticize the court?

MR. KLAYMAN: Because I am an officer of the court and I take it seriously. And criticism goes both ways. There is a First Amendment, your Honor.

THE COURT: Mr. Klayman, is there anything else you want to say?

MR. KLAYMAN: No.

THE COURT: Then this case is over.

(Trial Tr. at 451-52) (emphasis added).

2. The December 9, 1996 Letter

Unfortunately, however, the case was not over. Some four weeks later, I received a letter, dated December 9, 1996 (the "December 9th Letter"), addressed to me and signed by both Messrs. Klayman and Orfanedes, which stated in part:

> Finally, as you may know, Mr. Orfanedes and I have been involved in very highly publicized and significant public interest litigation, Judicial Watch, Inc. v. U.S. Department of Commerce, Case No. 95-0133 (RCL) (D.D.C.), which involves a Mr. John Huang, Ms. Melinda Yee and other persons in the Asian and Asian-American communities. See Exhibit 1. Recently, we came upon a document in this case which mentions your name in the context of other prominent Asian-American appointees of the Clinton Administration. See Exhibit 2. Accordingly, could you please formally advise us whether you know either of these individuals, as well as what relationship, contacts, and/or business, political or personal dealings, if any, you have had with them, or persons related in any way to the Clinton Administration. Please also advise us if you had seen the enclosed or similar newspaper articles or press accounts before this case was tried on November 6, 7, 12 and 13, 1996.

Attached as Exhibit 1 to the December 9th Letter were eight articles from magazines and newspapers reporting on the recent controversy regarding John Huang, the Democratic National Committee, and campaign contributions. Mr. Klayman is mentioned in some of the articles. Exhibit 2 to the December 9th Letter is a computer-generated print-out of a newspaper or magazine article that appeared on November 4, 1994, more than two years ago, in which certain presidential appointments of Asian-Americans are listed, including John Huang and myself.

3. The December 19, 1996 Comments

After receiving the December 9th Letter, I directed counsel to appear for a conference at which I asked respondents to explain the basis on which they felt it was appropriate to ask me the questions contained in their Letter. Mr. Klayman spoke on their behalf and articulated the view that they asked the questions because: (1) they felt I had made some comments directed toward them that were critical and "in some way personal"; (2) they were involved in a case against the Commerce Department and the Clinton Administration in which they had been accused of being biased against the Asian-American community; and (3) I was a recent appointee of the Clinton Administration and had been actively involved, prior to taking the bench, with the Asian American Legal Defense and Education Fund and the Asian American Bar Association of New York. (12/19/96 Tr. at 4-9). Mr. Klayman then said the following to me:

> I frankly felt, and Mr. Orfanedes frankly felt, that the remarks in some way were personal, and we are concerned, as advocates on behalf of our client, given the unusual nature of this case concerning Mr. Huang, that somehow subjectively this did not in any way influence you or perhaps have you view me negatively or Mr. Orfanedes.

(12/19/96 Tr. at 6).

To the extent there was any doubt that the questions in respondents' December 9th Letter were asked of me in part because of my race, that doubt was eliminated by Mr. Klayman's responses to my questions:

> THE COURT: . . .
>
> What I hear is that you are asking questions of me because you have some questions about my fairness and impartiality because of my race. Is that not so?
>
> MR. KLAYMAN: No, that's not so, your Honor.
>
> THE COURT: Would you have asked me these questions if I were not Asian-American?
>
> MR. KLAYMAN: I might have.

. . .

THE COURT: You would have asked me these questions if I were Caucasian or African-American?

MR. KLAYMAN: Let me tell you why I might have. And I don't see any harm in asking these questions because I have a duty to a client.

THE COURT: Did your client ask you to ask these questions of me?

MR. KLAYMAN: My client is aware of the general issues. They did not ask me to ask these questions of you.

Frankly, your Honor, given whatever your response may be, I don't know that there's any issue here at all, but I felt that asking the question was something that would be prudent and wise and part of my responsibility to represent our client zealously within the balance of the law.

It's not your race. I myself am a minority. I myself have been subject to discrimination. I am sensitive to that.

THE COURT: You are standing there and you are telling me that you did not ask these questions of me because I am Asian-American, is that what you are telling me?

MR. KLAYMAN: I'm saying that is part of it.

THE COURT: You are conceding that that is part of it?

MR. KLAYMAN: Part of it, yes. And I'm also asking the questions --

THE COURT: You are conceding that you asked questions of the court, at least in part, because of my race?

MR. KLAYMAN: In part. And let me tell you why. And I would [have] asked questions because you're also a recent appointee of the Clinton Administration. Has nothing to do with it. But you have been active, your Honor, for instance, in these kinds of efforts. And I commend you for your activity on behalf of

> Asian-Americans, with regard to the Asian-American Legal Defense Fund and being a president of the Asian-American Bar Association. I myself have been active in similar types of things and am fully supportive of those activities.
> But we are all human, and sometimes, sometimes subjective criteria can unwittingly, no matter how ethical, no matter how decent, no matter how honest someone is -- and we believe you to be that -- they can subjectively influence our decision-making. I, for instance, would not sit as a Jewish American on a case that involved a Palestinian. I wouldn't do it if I was a judicial officer just because of a lot of things which enter into the subjectivity of all our thinking.
> I'm not making any accusations, but I felt that I had a right, given what --
> THE COURT: Based on what? Based on what did you have that right?
> MR. KLAYMAN: Representing the client. We live in the real world, your Honor. People are influenced by subjective criteria.

(12/19/96 Tr. at 7-9).

Mr. Klayman articulated the view that he was simply asking questions of the Court, that he was not making accusations, and that there was no harm in asking the questions. (12/19/96 Tr. at 9-12). Mr. Orfanedes spoke briefly and stated that he did not "see this as necessarily race-based." (Id. at 12). Mr. Klayman then purported to advise me on the canons of judicial ethics (id. at 14) and eventually suggested that I "search [my] own soul":

> [MR. KLAYMAN:] Now, I believe your Honor has to search his own soul to a large extent. There may be independent legal requirements here on whether or not you wish to advise this court of some of the questions which we asked, which are benign, which were posed in a very respectful way. We ask that this letter [the December 9th letter] be made part of the court

record.
THE COURT: The letter has already been docketed. I am not going to search my soul. I do not need to do any soul searching at all. The letter is offensive. I find the letter to be offensive. I do not think it is benign nor do I think it is respectful. Not at all.
MR. KLAYMAN: I take it your Honor is not going to respond to the questions.
THE COURT: I am not going to respond to your questions. I have heard no basis that would give me any reason to answer your questions.
(12/19/96 Tr. at 16).

E. The Order To Show Cause

On January 10, 1997, in accordance with General Rule 4 of the Court, and in particular paragraphs (f), (g), and (k) thereof, I ordered Messrs. Klayman and Orfanedes to show cause why they should not be sanctioned or disciplined for violating Disciplinary Rules 1-102(A)(5) and 7-106(C)(6) by their conduct in this case on November 13, 1996 and December 19, 1996 and their December 9th Letter.

Respondents retained counsel, who submitted a letter brief dated January 24, 1997 (the "Letter Brief") on respondents' behalf. In the Letter Brief, respondents essentially argue that their conduct could not prejudice the administration of justice or degrade a tribunal. In addition, respondents contend that they acted reasonably in sending the December 9th Letter because of the "notoriety" surrounding their lawsuit against the Department of Commerce, which focused on "a prominent Presidential appointee, John Huang, who is Asian-American," their involvement in the lawsuit, and what they believed to be my hostility toward them personally. (Letter Br. at 5-6). The Letter Brief further states:

> Mr. Klayman and Mr. Orfanedes became concerned that because the Court was a recent appointee of President Clinton and Mr. Huang was a principle [sic] advisor on Asian-American appointments and fund raising and Mr.

> Klayman had been prominently mentioned in the media for his role in the Commerce Department case, which focused in part on the White House, the Democratic National Committee, John Huang, Melinda Yee, and other persons in the Asian and Asian-American communities, and because the lawsuit had elicited such angry responses from the White House, Democrats and the Asian-American community, that the Court might be angry at them and unable to be fair and impartial in a case in which they were counsel. . . .

(Letter Br. at 8-9) (emphasis added). Respondents also contend in the letter that they did not ask the questions because of any concern that I was biased because of my race, and state that they "strive to be free of racial prejudice and believe they are." (Letter Br. at 10-11).

Finally, respondents contend in the Letter Brief that no further action is required, but that if the Court believes otherwise, "further identification of the issues, facts and law involved would be necessary." In that event, they request that the matter be referred to another judge of this Court. (Letter Br. at 12-13).

DISCUSSION

A. Procedural Issues

Rule 4 of the General Rules of this Court governs the discipline of attorneys. Attorneys are entitled to notice and an opportunity to be heard. Gen. Rule 4(f). If, after such notice and opportunity, they are found guilty by clear and convincing evidence of violating the Code of Professional Responsibility, they may be disciplined. Id. In the case of an attorney admitted pro hac vice, discipline may include censure, suspension, or an order "precluding the attorney from again appearing at the bar of this court." Gen. Rule 4(g). In addition, "upon the entry of an order of preclusion, the clerk shall transmit to the court or courts where the attorney was admitted to practice a certified copy of the order, and of the

court's opinion, if any." Id.

Where misconduct occurs in the presence of a judge of this Court or "in respect to any matter pending in this Court," the matter "may be dealt with directly by the judge in charge of the matter or at said judge's option referred to the committee on grievances, or both." Gen. Rule 4(k).

Here, respondents raise three procedural issues: (1) whether further action is required; (2) if so, whether the proceedings should be delayed for "further identification of the issues, facts and law"; and (3) whether the matter should be referred to another Judge of the Court. (Letter Br. at 12-13).

As to the first procedural issue, for the reasons stated herein, I believe further action is required.

As to the second procedural issue, respondents have been provided with notice and an opportunity to be heard. Indeed, they were given two opportunities to explain why they asked the questions contained in the December 9th Letter. Moreover, my order to show cause specified that I was concerned about their conduct on November 13 and December 19, 1996 and their December 9th Letter, and it further specified the two Disciplinary Rules that I believed were implicated. Hence, there is no need for "further identification of the issues, facts and law involved."

Finally, as to the third procedural issue, respondents request that the matter be referred to another Judge of this Court. The misconduct, however, occurred both in my presence and "in respect to" a matter pending before me. Thus, I have the option of dealing with the matter "directly." I choose to do so.

B. The Applicable Disciplinary Rules

Two Disciplinary Rules of the Code of Professional Responsibility (see Appendix to N.Y. Judiciary Law (McKinney 1992 & Supp. 1997)) must be considered. They are DR 1-102(A)(5) and DR 7-106(C)(6).

DR 1-102(A)(5) provides that:

> A lawyer shall not . . . engage in conduct that is prejudicial to the administration of justice.

Disciplinary Rule 7-106(C)(6) provides that:

> In appearing as a lawyer before a tribunal, a lawyer shall not . . . engage in undignified or discourteous conduct which is degrading to a tribunal.

Hence, the issue presented is whether the record shows, by clear and convincing evidence, that respondents engaged in conduct that was "prejudicial to the administration of justice" or that was "undignified or discourteous" and "degrading to a tribunal."

Fortunately, the case law on the subject of whether attorneys violated their ethical obligations by their conduct toward courts is sparse. It is clear, however, that attorneys who engage in disrespectful conduct against courts are subject to discipline.

For example, in In re Evans, 801 F.2d 703 (4th Cir. 1986), cert. denied, 480 U.S. 906, 94 L.Ed. 2d 520, 107 S.Ct. 1349 (1987), an attorney was disbarred by the district court for accusing a magistrate judge of either being incompetent or having a "Jewish bias" in favor of an adversary. Id. at 704. The district court found that the attorney had, by his conduct, violated DR 1-102(A)(5), 7-106(C)(6), and 8-102(B).[3] Id. at 705.

The attorney appealed, and the Fourth Circuit affirmed, concluding, among other things, that the attorneys' accusations against the magistrate of incompetence and religious and racial bias were "unquestionably undignified, discourteous, and degrading." Id. at 706. Moreover, the Fourth Circuit found that because the accusations were made while the underlying case was on appeal, the district court properly viewed the accusations as "an attempt to prejudice the administration of justice in the course of the litigation." Id.

In People ex rel. Chicago Bar Ass'n v. Metzen, 291 Ill. 55, 125 N.E. 734 (Ill. 1919), an attorney was disbarred for writing a letter to a judge stating that the attorney "was usually engaged in dealing with men and not irresponsible political manikins or appearances of men." 125 N.E. at 735. The

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[3] DR 8-102(B) prohibits a lawyer from making false accusations against a judge. Respondents have disavowed that they were making any accusations against me. Although the point is debatable, I have chosen not to invoke DR 8-102(B).

Illinois Supreme Court wrote:

> Judges are not exempt from just criticism, and whenever there is proper ground for serious complaint against a judge, it is the right and duty of a lawyer to submit his grievances to the proper authorities, but the public interest and the administration of the law demand that the courts should have the confidence and respect of the people. Unjust criticism, insulting language, and offensive conduct toward the judges personally by attorneys, who are officers of the court, which tend to bring the courts and the law into disrepute and to destroy public confidence in their integrity, cannot be permitted.

Id. at 735. See also In re Greenfield, 24 A.D.2d 651, 262 N.Y.S.2d 349, 350 (2d Dep't 1965) (suspending one attorney and disbarring another for writing a letter to a judge falsely accusing the judge of misconduct in office); Kentucky Bar Ass'n v. Williams, 682 S.W.2d 784, 786 (Ky. 1984) (suspending attorney for three months for deliberately failing to appear for court appearance and for writing disrespectful letter to the trial judge and holding "deliberately disrespectful actions toward the judiciary cannot help but tend to bring Bench and Bar into disrepute").

The source of a court's power to discipline an attorney for misconduct is clear. As the Supreme Court has held,

> Courts have long recognized an inherent authority to suspend or disbar lawyers. . . . This inherent power derives from the lawyer's role as an officer of the court which granted admission.

In re Snyder, 472 U.S. 634, 643, 86 L.Ed. 2d 504, 105 S.Ct. 2874 (1985); accord In re Jacobs, 44 F.3d 84, 87 (2d Cir. 1994) ("A district court's authority to discipline attorneys admitted to appear before it is a well-recognized inherent power of the court."), cert. denied, 516 U.S. 817, 116 S. Ct. 73, 133 L.Ed. 2d 33 (1995); People ex rel. Karlin v. Culkin, 248 N.Y. 465, 470-71, 162 N.E. 487 (1928) ("'Membership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private

gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.") (citations omitted). This power extends as well to out-of-state attorneys who are granted the privilege of appearing pro hac vice: "Just as with a regularly admitted attorney, one seeking admission pro hac vice is subject to the ethical standards and supervision of the court." In re Rappaport, 558 F.2d 87, 89 (2d Cir. 1977); see also Leis v. Flynt, 439 U.S. 438, 441-42, 58 L.Ed. 2d 717, 99 S.Ct. 698 (1979) (ability of an out-of-state attorney to appear pro hac vice is a "privilege" and "not a right granted either by statute or the Constitution").

C. Respondents' Conduct

I find, by clear and convincing evidence, that respondents, and in particular Mr. Klayman, engaged in undignified and discourteous conduct that was both degrading to the Court and prejudicial to the administration of justice. That conduct includes the following:

1. The November 13, 1996 Comment

Mr. Klayman stated on November 13, 1996 that "we hope in the future this court functions better because frankly it has not functioned well . . . ." (Trial Tr. at 451). This comment was undignified, discourteous, and degrading to the Court. Although respondents now contend that this comment "was not referring to the period after the case was reassigned," nonetheless, the comment was not made in a constructive manner and was degrading to the Court as a whole. (Letter Br. at 3).

In fact, a review of the court file shows that whatever delay there was in the case was largely attributable to Macdraw and its counsel. For example, Macdraw did not make a timely jury demand; as a consequence, it filed a motion for a jury trial, a renewed motion for a jury trial, a petition for a writ of mandamus requiring the district court to grant a jury trial, and a petition for rehearing en banc -- all of which were unsuccessful. Ultimately, Macdraw requested and was granted a stay of the proceedings so that it could file a petition for

certiorari to the Supreme Court. In addition, although it had no realistic chance of winning a summary judgment motion as the plaintiff in a case that turned on a disputed oral promise, it nonetheless filed such a motion, which led to a cross motion for sanctions and further litigation, including appellate litigation. All of these actions -- as well as others by Macdraw and its attorneys -- served to prolong the proceedings.

2. The December 9th Letter

The questions contained in the December 9th Letter were inappropriate and were asked in an undignified and disrespectful manner. They were asked, as respondents concede, in part because I am Asian-American. They were asked because respondents were concerned that because I had been active with the Asian American Legal Defense and Education Fund and the Asian American Bar Association of New York before I took the bench and they had been involved in litigation that involved some individuals who happened to be Asian-American, I "might be angry at them and unable to be fair and impartial in a case in which they were counsel." (Letter Br. at 8-9).

In essence, respondents were suggesting that a judge might be "angry" at them and therefore unable to treat them fairly merely because (1) the judge was Asian-American and (2) they were involved in what some apparently have perceived to be "anti-Asian" litigation. This sentiment is absurd and demeans me individually and the Court as a whole. In fact, I was not aware, until it was brought to my attention in the December 9th Letter, that Mr. Klayman and Mr. Orfanedes had any connection to any litigation involving the John Huang fund-raising controversy.

Mr. Klayman's comment that if he were a "judicial officer" he "would not sit as a Jewish American on a case that involved a Palestinian" (12/19/96 Tr. at 9) is most telling. Judges cannot recuse themselves solely on the basis of their race or religion or the race or religion of the attorneys or parties who come before them. As Judge Motley wrote more than 20 years ago in denying a motion for her recusal in a sex discrimination case brought by a female attorney against a law firm:

> It is beyond dispute that for much of my legal career I worked on behalf of blacks who suffered race discrimination. I am a woman, and before being elevated to the bench, was a woman lawyer. These obvious facts, however, clearly do not, ipso facto, indicate or even suggest the personal bias or prejudice required [for recusal]. The assertion, without more, that a judge who engaged in civil rights litigation and who happens to be of the same sex as a plaintiff in a suit alleging sex discrimination on the part of a law firm, is, therefore, so biased that he or she could not hear the case, comes nowhere near the standards required for recusal. Indeed, if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.

Blank v. Sullivan & Cromwell, 418 F.Supp. 1, 4 (S.D.N.Y. 1975). See also Commonwealth of Pennsylvania v. Local Union 542, IUE, 388 F. Supp. 155, 163 (E.D. Pa.), aff'd, 478 F.2d 1398 (3d Cir. 1974), cert. denied, 421 U.S. 999 (1975) (Higginbotham, J.) (denying defendant's motion to disqualify judge from hearing race discrimination claim, on basis of his race and comments he made in speech to "group composed of black historians," and holding "that one is black does not mean, ipso facto, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant").

3. The December 19, 1996 Comments

Mr. Klayman's lack of respect for the Court continued on December 19, 1996. After he admitted that the questions in the December 9th Letter were asked of me in part because of my race (12/19/96 Tr. at 7-9), he presumed to advise me on my ethical obligations under the canons of judicial ethics. (Id. at 14, 16-17). He took it upon himself to suggest that "your

Honor has to search his own soul to a large extent." (Id. at 16). These comments went beyond mere arrogance and foolishness and were undignified, discourteous, and degrading to the Court.

D. Respondents' Claim of Hostility

In an effort to rationalize their behavior, respondents contend that they were concerned about my fairness and impartiality because comments that I made led them to believe that I "had become hostile to them personally." (Letter Br. at 6). They cite to a number of specific instances, including my reference to their "abusive and onerous [sic] questioning in the depositions" (Letter Br. at 6 (citing Trial Tr. at 444)); my characterization of one of plaintiff's theories as "preposterous" (id.); my reliance on the failure of Macdraw to have made a demand on CIT before bringing suit (id.); my reaction to plaintiff's stated intention to file post-trial motions and my reference to plaintiff's attorneys' fees (id. at 448). To the extent I expressed any impatience, it was not due to any personal bias against respondents; rather, it was the result of a bias against questionable lawyering, the taking of specious positions, and the wasting of resources of the parties and the Court.

1. The Depositions

Respondents complain that "the Court spoke of 'very abusive and onerous questioning in the depositions' by plaintiff's counsel without identifying it." (Letter Br. at 6 (citing Trial Tr. at.444)). Not only is my statement misquoted, it is also taken out of context. The complete and accurate statement was as follows:

> I also note, by the way, that having read the depositions I am convinced that there was no effort on the part of CIT to defraud Macdraw or even to take advantage of Macdraw. To the contrary, I found the CIT witnesses to be frank and forthright in the face of some very abusive and obnoxious questioning in the depositions.

(Trial Tr. at 444) (emphasis added). Moreover, Mr. Klayman's questioning at the depositions was indeed "abusive and obnoxious" at times. For example, at the deposition of John Zakoworotny, he stated to the witness: "It [the question] calls for a yes or no. Don't play around with the questions. Give me a yes or no. . . . Tell me yes or no. This is not an exercise in your evading my question." (Zakoworotny Dep. at 67-68). When the witness later stated that he could not answer a question about a document based on his "initial review," Mr. Klayman responded: "You want to review it more thoroughly? Read it five times." (Id. at 78). When the witness tried to answer another question by providing an explanation, Mr. Klayman chastised him as follows:

> Just answer the question. I think you've had too much preparation. Just answer the question. And I put "preparation" in quotes. You're tied like a pretzel. Just answer the question.

(Id. at 81-82). There are numerous other examples. (See, e.g., Zakoworotny Dep. at 44-45, 56-57, 60-61, 67-68, 71, 83, 86, 90-91, 97; Swallwell Dep. at 21-22, 40-41).

2. Plaintiff's "Preposterous" Claim

I did describe one of Macdraw's theories as being "preposterous" (Trial Tr. at 444), and indeed it was. Macdraw was contending that a relatively low-level employee, who had been employed by CIT at that point for only five months, was conspiring with others at CIT to cheat Macdraw by lulling it into providing services to Laribee to enhance the value of equipment that CIT could later seize as security and re-sell at a higher price when Laribee defaulted. The only motive that Macdraw could offer for why Johnston would engage in this conspiracy to defraud was that he hoped to improve his chances of being promoted. The notion that a low level employee would see perpetuating a fraud as a means to obtain a promotion is indeed preposterous.

3. The Absence of a Demand

In my findings of fact and conclusions of law, I observed

that "it is also significant that Macdraw never, prior to this lawsuit, ever made a demand on CIT or communicated its belief that CIT had made a promise or guarantee that it refused to honor." (Trial Tr. at 444). Respondents claim that this observation further demonstrates my hostility toward them because my observation (1) was purportedly based on "an error of fact," citing PX 133, and (2) in any event was "irrelevant." (Letter Br. at 6). Respondents are wrong in both respects.

First, PX 133 hardly constitutes a "demand" letter or a communication from Macdraw to CIT setting forth a claim that CIT had made a promise or guarantee that it refused to honor. Rather, the January 29, 1991 letter from counsel for Macdraw simply asks Mr. Zakoworotny of CIT to "contact [the attorney] regarding certain issues that [Macdraw] needs to address promptly regarding the balance due." (PX 133). In contrast, Mr. Colella, the President of Macdraw, testified in response to the Court's questions that Macdraw had not communicated to CIT, before bringing the lawsuit, its belief that CIT had made and failed to honor such a promise. (Trial Tr. at 145-46; see also id. at 142-43). Hence, the record shows that no demand was made prior to suit being filed.

Second, the issue of whether Macdraw had made its view known to CIT before the filing of suit was relevant. Macdraw's failure to make such a demand supports CIT's contention that the claim lacks any merit and that, as a factual matter, Macdraw did not actually believe that any promise had been made by CIT to Macdraw. Significantly, when CIT's counsel commenced this line of inquiry on cross-examination of Mr. Colella, Macdraw's counsel did not object. (Trial Tr. at 142-46).

4. Post-Trial Motions and Attorneys' Fees

Respondents also find evidence of my "hostility" toward them in my response to their stated desire to make post-trial motions and my comments on what they describe as "irrelevant issues like the reasonableness of their attorneys fees." (Letter Br. at 6). Apparently to show the reasonableness of their fees, respondents point to the fact that defendants incurred some $355,654 in legal fees. (Id. at 7).

My comments, however, reflect no bias. First, the issue of Macdraw's attorneys' fees was raised on cross-examination of Mr. Colella. Again, there was no objection to this line of inquiry. (Trial Tr. at 173-74). Second, my concern was not with whether the fees that Macdraw had already paid were reasonable for the services rendered or whether services were actually rendered. Rather, I was concerned that Macdraw had already spent more than $300,000 on a claim that, in my view, never had much chance of succeeding. I was also concerned that $ 300,000 in fees had been spent on a claim based on CIT's refusal to provide $ 711,000 in financing. Furthermore, I was concerned that Macdraw would be billed even more fees for post-trial motions that had little, if any chance of success -- indeed, post-trial motions in a non-jury case in which detailed pre-trial briefs had been filed (see Trial Tr. at 8-9) and where the outcome had turned almost entirely on issues of credibility. Indeed, my comments were made in the following context:

> MR. KLAYMAN: I understand your Honor's decision, and I'm not going to use that forum as an opportunity to re-argue that. We will be moving with post-trial motions accordingly. We feel that your Honor will have an open mind once you have had a chance to look at this in a full perspective.
>
> THE COURT: What post-trial motions are we talking about? This case has gone on for 5 years. This [is] not a jury case where I have to consider if there was evidence to support the jury's verdict. I'm not going to grant any post-trial motions.
>
> I granted the defendants' motion for judgment as a matter of law. What motions do you propose to make? One of the things that troubles me, frankly, is Mr. Colella testified that he spent $300,000 in legal fees on this case. Frankly, I don't understand it. . . .

(Trial Tr. at 447-48).

The fact that CIT also spent some $355,000 in fees certainly does not help respondents. If anything, by the time this case is completed, the parties together would have spent more in

legal fees than the $711,000 in financing in question.

E. The Administration of Justice

In determining whether respondents have engaged in improper conduct, it is important to consider two issues that are raised by their arguments: First, to what extent do lawyers have an obligation to question the impartiality of judges? Second, what harm is there in asking?

Lawyers do have an obligation to inquire when they have a reasonable basis for believing that a judge might not be fair and impartial. But there must be a reasonable basis. In re Evans, 801 F.2d 703, 705-06 (4th Cir. 1986), cert. denied, 480 U.S. 906, 94 L.Ed. 2d 520, 107 S.Ct. 1349 (1987); People ex rel. Chicago Bar Ass'n v. Metzen, 291 Ill. 55, 125 N.E. 734, 735 (Ill. 1919). And where there is a reasonable basis for doing so, there is no harm in asking -- as long as the "asking" is done in a discreet, dignified, and respectful way. If a lawyer has a reasonable basis for inquiring about a judge's ability to be impartial, the attorney might, for example, request a pretrial conference to explain the circumstances and to ask the Court whether the Court believes there is any reason it ought not to hear the particular case. But where there is no reasonable basis for questioning a judge's impartiality, or where the questioning is done in an undignified and disrespectful manner, there is harm in asking, for the integrity of the Court is challenged, the administration of justice is prejudiced, and both the bar and the bench are degraded.

Here, respondents had no reasonable or good faith basis to question my fairness and impartiality. Rather than acknowledge that fact and apologize for their actions, they instead have resorted to mischaracterizing and misrepresenting the record in an effort to justify their actions. The record does not, however, provide the justification they seek.

Moreover, instead of raising the issue discreetly and respectfully, they confronted me with what was tantamount to a series of written interrogatories, including: "could you please formally advise us whether you know either of these individuals, as well as what relationship, contacts and/or business, political or personal dealings, if any, you have had

with them, or persons related in any way to the Clinton Administration." They asked for my "immediate attention to this matter," and noted that a deadline was approaching for any post-trial motions. This was followed by further disrespectful conduct, including urging me to "search [my] own soul."

Significantly, Mr. Klayman has a history of accusing judges of bias or prejudging cases. In this case, although he claims they are not accusations, he has raised questions about my ability to be fair. He accused Judge Kram of prejudging the case against plaintiff and of having "perhaps an unintentional, yet readily apparent, predisposition against its claims." And in 1992, in a case in the United States District Court for the Central District of California, Mr. Klayman accused a judge of being anti-Asian and anti-semitic and having "prejudged" the case. See Baldwin Hardware Corp. v. Franksu Enter. Corp., 78 F.3d 550, 555 (Fed. Cir.), cert. denied, 117 S. Ct. 360 (1996). Mr. Klayman's repeated efforts to find fault with the judges before whom he appears certainly interferes with the administration of justice. Cf. In re Snyder, 472 U.S. 634, 647, 86 L.Ed. 2d 504, 105 S.Ct. 2874 (1985) ("a single incident of rudeness or lack of professional courtesy . . . does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is 'not presently fit to practice law in the federal courts'").

Mr. Klayman has also been sanctioned on prior occasions, including by Judge Kram in this case. Although the Second Circuit reversed the award of sanctions (largely on procedural grounds), it noted in its opinion that "in pursuing this appeal, plaintiff's counsel submitted briefs that included inaccurate characterizations of the record and comments that we consider entirely inappropriate." 73 F.3d at 1262.

Mr. Klayman was also sanctioned in the Baldwin case in 1992. The trial judge, because of his belief that Mr. Klayman had acted in bad faith and made certain misrepresentations, permanently and prospectively barred Mr. Klayman from appearing before him again pro hac vice and required him to attach a copy of the court's order to any future pro hac vice application in that court. 78 F.3d at 561-62. In particular, the trial judge found that Mr. Klayman had represented to the court, when he applied for admission pro hac vice, that he had

never been sanctioned before when, in fact, his former firm, Klayman & Gurley, P.C., had been sanctioned in a matter handled by Mr. Klayman and two other attorneys at the firm. Id. at 562. The Federal Circuit affirmed, holding, among other things, that the trial judge had not abused his discretion in finding misconduct on the part of Mr. Klayman and his firm. Id.

Mr. Klayman and his current firm were also sanctioned $1,500 in Wire Rope Importers' Ass'n v. United States, 18 C.I.T. 478, 1994 WL 235620 (Ct. Int'l Tr. 1994), for making a "frivolous" filing and for raising arguments that "stood no chance of success." Id. at *6-7.

Mr. Orfanedes is certainly less culpable than Mr. Klayman. The comments about which I am concerned were made not by him but by Mr. Klayman. Moreover, Mr. Orfanedes does not appear to have a history of this type of conduct as does Mr. Klayman. Nonetheless, Mr. Orfanedes signed the letter, was present when Mr. Klayman made the comments, and effectively joined in them. Hence, he must be held accountable as well.

CONCLUSION

As noted above, in reversing the prior award of sanctions against plaintiffs' counsel in this case, the Second Circuit wrote:

> There is no question that our rules permit sanctions where an attorney's conduct degrades the legal profession and disserves justice. In the face of significant abuse, a district court need not hesitate to impose penalties for unreasonable conduct and acts of bad faith.

73 F.3d at 1262. Respondents have engaged in significant abuse, unreasonable conduct, and acts of bad faith. Their conduct has degraded the legal profession and disserved justice.

Accordingly, it is hereby ORDERED as follows:

(1) the admissions of Larry Klayman, Esq. and Paul J. Orfanedes, Esq. pro hac vice are hereby revoked; hence, if there are any further proceedings in this case in this Court, Macdraw will be required to retain new counsel;

(2) any future applications by Messrs. Klayman and Orfanedes to appear before me on a pro hac vice basis will be denied;

(3) Messrs. Klayman and Orfanedes shall provide a copy of this opinion to any other judge in this District to whom they may make a future application for admission pro hac vice; and

(4) The Clerk of the Court shall transmit to the courts where Messrs. Klayman and Orfanedes are admitted (as set forth in their applications for admission pro hac vice) a certified copy of this Opinion and Order.

SO ORDERED.

Dated: February 5, 1997
New York, New York

/s/
DENNY CHIN
United States District Judge

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in thousand nine hundred and ninety-eight.

MacDRAW, INC.,

Plaintiff, SEAL

KLAYMAN AND ASSOCIATES, P.C.,

Appellants,

v. Dkt No: 97-7193

CIT GROUP EQUIPMENT,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Klayman and Associates, P.C., Larry Klayman and Paul J. Orfanedes.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: /s/

Beth J. Meador
Administrative Attorney

List of Partics

The plaintiff and defendants in the civil action in which the sanctions in question were imposed were petitioners' client, MacDraw, Inc., plaintiff, and CIT Group Equipment Financing, Inc., and Richard Johnston, defendants. The plaintiff and Defendants were nominal parties in the appeal of sanctions in the Court of Appeals in that they were named in the caption and defendants were served with all papers an appellee would have been entitled to receive. No papers were filed by or on behalf of these parties in the sanctions appeal as distinguished from the separate appeal on the merits which is sub judice in the Court of Appeals, Case No. 97-7029, except that in reply to an inquiry from the Clerk, counsel for defendants informed the Clerk they would not be filing a brief. Counsel for defendants appeared at the argument of one motion and the argument of the sanctions appeal, but disclaimed any interest and took no position on the merits of the sanctions appeal. As before, petitioners will serve upon counsel for defendants all papers in this case that a respondent would be entitled to receive.

RAMSEY CLARK
LAWRENCE W. SCHILLING

LAW OFFICE
36 EAST 12th STREET
NEW YORK, N.Y. 10003
(212) 475-3232
FAX (212) 979-1583

January 24, 1997

The Honorable Denny Chin
United States District Judge
United States Courthouse
500 Pearl Street
New York, NY 10007

Re: MacDraw v. CIT
91 Civ. 5153 (DC)

Dear Judge Chin,

We have been retained by Larry Klayman, Esq., Paul J. Orfanedes, Esq., and Klayman and Associates, P.C., to represent them in connection with your order to them to show cause in writing on or before January 24, 1997 why they should not be sanctioned for violation of the Disciplinary Rules.

The factual basis cited by the Court for its order is the conduct of counsel on November 13, 1996 and December 19, 1996 and their letter to the Court dated December 9, 1996.

We have obtained and reviewed the record in the case including trial transcripts and depositions. We have discussed the entire proceeding with Mr. Klayman and Mr. Orfanedes and to a degree their representation of Judicial Watch, Inc. in litigation against the U.S. Department of Commerce referred to in the letter of December 9, 1996 and the hearing on December 19, 1996. We will address those portions of the two transcripts and the letter which we assume from their content, comments in the hearings and the circumstances give rise to the show cause order.

1. **Proceedings of November 13, 1996, RT436-452.**

Most of the hearing consists of the Court's opinion and

decision granting a motion for the defendant under F.R.Civ.P. 52(c) for judgment as a matter of law. RT436-445. There followed a colloquy between the Court and Mr. Klayman in which the Court severely criticized plaintiff's counsel. At the end of the colloquy the following exchange in which Mr. Klayman defended himself occurred:

> MR. KLAYMAN: Your Honor, I understand your position and I understand you have denied the motions. We will simply file a notice of appeal. But I had to say that for the record. We are not here 6 years later because we wanted to be. You are newly appointed to the bench, we are aware of the fact that you did speed this case to trial. We hope in the future this court functions better because frankly it has not functioned well --
>
> THE COURT: Mr. Klayman, that is totally out of line. I don't know what you are doing now. I have no history with you.
>
> MR. KLAYMAN: What I am telling you is, you criticized us for being 6 years later into this case and I am pointing out that we would have liked to have tried this case a lot sooner, period. I'm not trying to embarrass you or anybody else.
>
> THE COURT: Believe me, you are not embarrassing me. This case is five or six years old for whatever the reason. When it came to me I moved it very quickly. Your client got his day in court. That's it. For you to stand there and criticize the court gets you nowhere. I just don't understand why you are doing that. How does it help you to stand there and criticize the court.
>
> MR. KLAYMAN: Because I am an officer of the court and I take it seriously. And criticism goes both ways. There is a First Amendment, you Honor.
>
> THE COURT: Mr. Klayman, is there anything else you want to say?
>
> MR. KLAYMAN: No.

> THE COURT: Then this case is over. RT451-52.

It is clear from the context that Mr. Klayman only stated that the court had not functioned well in the past. He was not referring to the period after the case was reassigned. He observed the case had been in court for years. He acknowledged the case was speeded to trial after reassignment. He stated the court had "not functioned well --" obviously referring to the past. His comments would seem reasonable regardless of who may have been responsible for the delays in a case pending five years without trial before its reassignment. The comments could not prejudice the administration of justice, or degrade a tribunal.

2. The letter to the Court dated December 9, 1996.

This is a two page letter with a number of attachments from magazines, newspapers and one document marked as Exhibit 13 in ancillary proceedings to Judicial Watch, Inc. v. U.S. Department of Commerce, Case No. 95-0133(RCL)(DDC).

Only one paragraph is relevant to this proceeding. It reads:

> Finally, as you may know, Mr. Orfanedes and I have been involved in a very highly publicized and significant public interest litigation, Judicial Watch, Inc. v. U.S. Department of Commerce, Case No. 95-0133(RCL)(DDC), which involves a Mr. John Huang, Ms. Melinda Yee and other persons in the Asian and Asian-American communities. See Exhibit 1. Recently, we came upon a document in this case which mentions your name in the context of other prominent Asian-American appointees of the Clinton Administration. See Exhibit 2.
>
> Accordingly, could you please formally advise us whether you know either of these individuals, as well as what relationship, contacts and/or business, political or personal dealings, if any, you have had with them, or persons related in

any way to the Clinton Administration. Please also advise us if you had seen the enclosed or similar newspaper articles or press accounts before this case was tried on November 6, 7, 12, and 13, 1996.

The letter was reasonable and was sent only to the Court and opposing counsel. Its contents were not made public. They were not placed in a formal motion open to the public. The purpose of the letter therefore must have been only to elicit the information requested. See ABA Model Code of Judicial Conduct, Commentary to Canon 3(E), "... A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification;" U.S. v. Cooper, 872 F.2d 1 (1st Cir. 1989). The letter could not prejudice the administration of justice, or degrade a tribunal.

The letter was written because Mr. Klayman and Mr. Orfanedes had been involved in a lawsuit, under the Freedom of Information Act against the U.S. Department of Commerce that had become the object of major media coverage itself. The lawsuit dealt with charges that were issues in the Presidential campaign then underway -- issues that symbolize the need for election campaign finance reform and control of campaign contributions in U.S. elections by foreign governments and interests. The handful of exhibits attached to the letter are not even the tip of the iceberg.

Because the notoriety surrounding the lawsuit focused on a prominent Presidential appointee, John Huang, who is Asian-American, his efforts to raise political contributions in the Asian-American community for the Democratic National Committee and secure government appointments of Mr. Huang and others from that community, many Asian-Americans criticized media coverage of the fund raising efforts of John Huang, those working with him and his access to the White House. Asian-American organizations and individuals protested the perceived anti Asian selectiveness of the publicity and the litigation. As an example, the Coalition of Asian-Pacific Americans applied for leave to appear as amicus curiae in an ancillary proceeding in the Commerce Department case in federal court in support of a motion for a protective order

sealing the deposition of Melinda Yee in San Francisco to prevent what it feared might be more publicity adverse to the Asian-American community.

The merits of that lawsuit and the widespread media coverage of the activity of John Huang and others are not at issue here.

Mr. Klayman and Mr. Orfanedes were keenly aware of the enormous emotion surrounding their case against the Commerce Department and the intensity of the political and other prejudices swirling around it. The White House and persons prominent in the Asian-American community were in the forefront.

Counsel came to believe that the Court had become hostile to them personally. Even before the hearing on November 13, 1996, they have pointed to many places in the record where the Court seemed impatient, or annoyed with them, while treating defense counsel differently, for instance, when defense counsel failed to pre-mark and copy trial exhibits.

On November 13, the Court spoke of "very abusive and onerous questioning in the depositions" by plaintiff's counsel without identifying it. RT444. The Court characterized one theory of their case as "preposterous." RT444. It then found significance in the related claim that plaintiff never made a demand on defendant prior to filing suit. RT444. This is based on an error of fact. A letter in the record (Plaintiff Exhibit 133) dated January 29, 1991, six months prior to filing of the suit, reflects both discussion with defendant and a written request to defendant's counsel regarding the claim. Counsel were troubled that the Court would comment on irrelevant issues like the reasonableness of their attorneys fees and whether any demands were made prior to suit without an adequate factual basis.

The Court precluded plaintiff's counsel from putting matters on the record saying "You can tell that to the Second Circuit." RT446. With no motions pending and without regard to what rights might be involved, the Court said, "I'm not going to grant any post-trial motions." RT448.

The Court stated in front of counsel's client that it was troubled that plaintiffs' executive "testified that he had spent $300,000 in legal fees in this case." RT448. The statement was

irrelevant to the merits of case, without adequate factual basis to evaluate and reflected prejudice against plaintiff's counsel. Attorneys for defendant have now filed statements with the Court revealing attorney fees for their time totalling $355,654 through September 30, 1996, before final trial preparation and trial. The Court charged plaintiff's counsel with "mischaracterizing the testimony" in a supplemental brief filed on November 2, 1996, without specifying the testimony. RT448.

The Court criticized plaintiffs' counsel for objecting to its questions during the trial, "... every time I had a question.. I got an objection to my own question. It was as if there was an effort to keep me from hearing what I really wanted to hear." RT450-51. Plaintiff's counsel believed this claim reflected a prejudice against them. The Court actively asked questions of witnesses, perhaps as many as fifty all told. On only a handful of occasions, three that we find, did plaintiff's counsel seek to interject a request, or a question, during the Court's questions, because it appeared a legal issue might be involved, a document might be best evidence, or a witness had become confused. They felt a duty to protect the witness and the record. The fact that the Court raised the issue after judgment and perceived the conduct of plaintiff's counsel toward his questioning witnesses so differently than they did suggested a prejudice against them.

Plaintiff's counsel had a duty to determine whether the Court was prejudiced against them and if so whether it impacted on their client. In the Commerce Department case plaintiff's counsel saw evidence that John Huang was intensively involved in raising funds in the Asian-American community for the Democratic National Committee and urging appointments of Asian-Americans to government positions. As an illustration, a four page list headed "Clinton Administration-Asian Pacific American Appointees" found in Mr. Huang's files includes your name at the top of the list. Another document marked Exhibit 13 attached to the December 9 letter which is an exhibit in a proceeding ancillary to the Commerce Department case, also an illustration, states:

> Spokespersons for the administration also emphasize Asian Pacific Americans are filling a variety of positions in government are

> not being pigeonholed into nondescript jobs that have no real responsibility. In the long list that has been put together , they cite such examples as Frederick Pang, assistant secretary of defense; John Huang, deputy assistant secretary for international economic policy in the Commerce Department; Ginger Lew, general counsel for the Commerce Department; Valerie Lau, inspector general for the treasury Department; Lorraine Chong, deputy assistant secretary, Employment & Training Administration for the Labor Department; and Denny Chin, a judge for the U.S. District Court in New York, just to name a few.

Mr. Klayman and Mr. Orfanedes became concerned that because the Court was a recent appointee of President Clinton and Mr. Huang was a principle advisor on Asian-American appointments and fund raising and Mr. Klayman had been prominently mentioned in the media for his role in the Commerce Department case, which focused in part on the White House, the Democratic National Committee, John Huang, Melinda Yee, and other persons in the Asian and Asian-American communities, and because the lawsuit had elicited such angry responses from the White House, Democrats and the Asian-American community, that the Court might be angry at them and unable to be fair and impartial in a case in which they were counsel. They reasonably believed they had a duty to their client to determine whether the Court had any associations with John Huang, Melinda Yee or other persons related to the Clinton Administration that might cause some prejudice affecting their client. They believed they needed to know whether the Court had read the attached magazine and newspaper articles, or similar reports that might have created a prejudice.

If later disclosures in the ongoing investigations and litigation which have now caused the resignation of John C. Wood, Jr., as the functional equivalent of U.S. Ambassador to Taiwan, reveal a relationship between the Court and any of the persons involved, or the Court's awareness of the media reports, that raise questions about the appearance and propriety of the Court's hearing this case, they would have

failed their client.

Mr. Klayman and Mr. Orfanedes made the inquiry discretely and professionally as they had a duty to do.

3. Proceedings of December 19, 1996: 19 pages.

As the Court stated, the "real reason" it ordered the December 19, 1996 hearing was "the last paragraph of the letter" of December 9, 1996, R. 3. The Court wanted to know the basis for asking for the information requested and in response, in defense of the request, Mr. Klayman undertook to explain the purpose of the letter. R. 4-7. As he did the Court interjected:

> "I am asking you another question. What I hear is that you are asking questions of me because you have some questions about my fairness and impartiality because of my race. Is that not so?"

There followed an exchange involving Mr. Klayman, Mr. Orfanedes and the Court in which the Court repeatedly revealed it believed the letter request reflected racial prejudice and was a personal insult, R. 7, lines 14-15, 17-18, 20-21; R. 8, lines 12-15, 17-18, 21-23; R. 9, line. 25; R: 10, line 1; R. 11, lines 1-4; R. 13, lines 3-5, 11-12, 17-21; R. 14, lines 10-11.

There is no other apparent basis in the hearing for the order to show cause.

The letter clearly did not ask questions because of any concern that the Court was biased because of his race. The information sought in the letter by counsel necessarily addressed in part Asian Americans, because John Huang is an Asian American. He solicited campaign contributions from Asians and Asian Americans. He urged Asian Americans for appointments to government positions. He worked with Asian Americans in these efforts. Melinda Yee is an Asian American. The facts, not any prejudice of counsel, or concern by it that the Court was biased because of his race, compelled the identification of persons as Asian-American and Asian because they were and it was in their capacity as Asian-Americans that they solicited funds from and urged and obtained appointments of Asian-Americans.

The letter also inquired about persons related in any

way to the Clinton Administration, because it, more than the Asian Americans involved, was the principal power and interest involved and it received the brunt of the adverse media coverage. And it appointed the Court.

The misunderstanding is unfortunate for counsel and the court. Counsel strive to be free of racial prejudice and believes they are. Both have worked extensively with Asians and Asian Americans and have fought for their rights as attorneys and individuals. In the case referred to by the Court as one in which Mr. Klayman "accused a judge in California of being anti-Asian," R. 14 (Dec. 19, 1996), Mr. Klayman was defending an Asian client, a plaintiff in the civil action then being tried, from what he considered to be a bias against Asians. That court had called his client, among other things, the "artful Taiwanese Dodger," had called Mr. Klayman "Mr. Schmuckler," for no apparent reason, had repeatedly mispronounced his client's name Goldstein and referred to him as "Mr. So and So and his ilk." id. 14-15. Cf. Standing Committee on Discipline of the U.S. District Court for the Central District of California v. Yagman, 55 F.3d 1340 (9th Cir. 1995), which involved the same judge. Both counsel have roots that know prejudice and discrimination. Mr. Klayman is a Jew. Mr. Orfanedes is of Greek descent. Both deny absolutely that they harbor any prejudice toward any Asian, Asian American, or any person because of race. Their record is clear. If by some failure of communication on their part the Court believed otherwise, they apologize. They had no such intention and deeply regret that it appeared to the Court that they did.

We have examined the case law in the Second Circuit under General Rule 4 for an overview of past practice. See e.g. Grievance Comm. for the Southern District of New York v. Polur, 67 F.3d 3(2d Cir. 1995) ; Grievance Comm. for the Southern District of New York v. Simels, 48 F.3d 640 (2d Cir. 1995); In re Jacobs, 44 F.3d 84 (2d Cir. 1994), cert. denied, October 2, 1995. It appears from these cases and Rule 4 itself that there are a number of different procedural avenues that might be followed in a case like this one.

Having made this submission in writing as directed by the Court in its order to show cause, respondents respectfully request the Court to conclude that no further action is

required. If the Court deems any further proceeding necessary, since there has been no clear specification of the conduct complained of, further identification of the issues, facts and law involved would be necessary. If there is any further proceeding respondents respectfully request that the matter be referred to another Judge of this Court as the fairest and most efficient procedure for resolution.

Respectfully submitted,
/s/
Ramsey Clark
/s/
Lawrence W. Schilling

cc: Susan G. Rosenthal, Esq.
Jeffrey H. Weinberger, Esq.

KLAYMAN & ASSOCIATES, P.C.

501 School Street, S.W.
Suite 700
Washington, D.C. 20024
Telephone 202 646-5160
Facsimile 202 646-5199

540 Brickell Key Drive
Suite 732
Miami, FL 33131
Telephone 305 373-2951
Facsimile 305 577-3848

VIA FEDERAL EXPRESS

December 9, 1996

The Honorable Denny Chin
U.S. District Court Judge
U.S. District Court for the
Southern District of New York
United States Courthouse
500 Pearl Street
Room 1020
New York, NY 10007-1581

Re: MacDraw, Inc. v. the CIT Group Equipment Financing, Inc., et al., Case No. 91 Civ. 5153 (DC)

Dear Judge Chin:

On Friday, December 6, 1996, we received a copy of the Judgment entered by the Court in the above-captioned matter, in which costs of $8,886.70 were taxed against Plaintiff MacDraw, Inc. (MacDraw"). While MacDraw had objected to Defendants's Bill of Costs, which sought to tax in excess of $21,170.80 in alleged costs against MacDraw, the costs ultimately awarded by the Court were not itemized in any fashion. Thus, MacDraw is unable to determine what items are being taxed against it. For purposes of appellate review, MacDraw respectfully requests that the Court issue an itemization of these costs.

In the alternative, MacDraw respectfully requests that the Court schedule a pre-motion conference so that MacDraw may file a motion to amend the judgment concerning this

matter. While we advised the Court that MacDraw would not be filing any post-judgment motions, given your comments about such motions at the close of the trial, we could not foresee that this issue and other issues (as set forth below) would arise at that time.

Finally, as you may know, Mr. Orfanedes and I have been involved in a very highly publicized and significant public interest litigation. Judicial Watch v. U.S. Department of Commerce, Case No. 95-0133(RCL)(DDC), which involves a Mr. John Huang, Ms. Melinda Yee and other persons in the Asian and Asian-American communities. See Exhibit 1. Recently, we came upon a document in this case which mentions your name in the context of other prominent Asian-American appointees of the Clinton Administration. See Exhibit 2. Accordingly, could you please formally advise us whether you know either of these individuals, as well as what relationship, contacts and/or business, political or personal dealings, if any, you have had with them, or persons related in any way to the Clinton Administration. Please also advise us if you had seen the enclosed or similar newspaper articles or press accounts before this case was tried on November 6, 7, 12 and 13, 1996.

We thank the Court for its immediate attention to this matter, as any post-trial motions must be filed by November 16, 1996.

Respectfully submitted,

KLAYMAN & ASSOCIATES, P.C.

/s/
Larry Klayman

/s/
Paul J. Orfanedes

cc: Jeffrey H. Weinberger, Esq.
Winick & Rich, P.C.

TIME MAGAZINE
11/11/96
FRONT COVER

The strange saga of Richard Jewell

THE
MONEY
TRAIL

(COVER STORY)

PHOTOGRAPH (U.S. banknote)

Both parties have traded favors for cash to win the White House. Will the new Clinton fund-raising scandals finally make voters demand real reform?

TIME MAGAZINE
11/11/96

WERE TRADE MISSIONS FOR SALE?

For an export-oriented American business an invitation to join the U.S. Commerce Secretary on one of his trade missions abroad is like a World Series ticket -- the hottest seat in town, and something you might just pay a top dollar to get. In 1992 Bill Clinton promised that his Administration would fight hard to help American companies win foreign business. That's a worthy goal of trade missions, which provide selected CEOs with priceless connections to the corporate heads and government officials of other nations.

But under the late Commerce Secretary Ron Brown were the democrats "selling" seats, using those missions to reward party donors? Those were the questions at the heart of the lawsuit filed by the nonprofit, conservative group Judicial Watch, Inc. The suit became an election issue last week, when Judicial Watch lawyers were allowed to conduct a videotaped deposition of Democratic fund raiser John Huang. In addition, thousands of pages of Commerce Department documents have been turned over to the group.

PHOTOGRAPH (Ron Brown, et al.)
The late Commerce Secretary Brown in China in 1994; his company was sought by companies.

The Commerce Department papers clearly indicate that many corporate contributors expected their money to earn them special consideration when seats were being handed out on the Secretary's plane. In a letter addressed to Assistant Commerce Secretary Jude Kearney, C. Payne Lucas, a development-organization executive, suggests that he should be added to a mission headed for South Africa in 1993 because he contributed $2,000 to the election campaigns of both Clinton and South African President Nelson Mandela. In another, Philip Verveer, a politically savvy Washington attorney, recommends a place on a 1994 mission to India for William

Ginsberg, CEO of Cellular Communications International, based in New York City. "Ginsberg was an early financial supporter of the Clinton/Gore campaign," Verveer writes.

These missives occasionally show federal officials urging their superiors to favor donor executives. In one letter, Reta Lewis, a political affairs official at the White House, urges that a spot be found for Gerald McGowan, a partner in a Washington law firm, on a trade mission to Indonesia or India. For one thing, Lewis points out, McGowan qualifies as a D.N.C. "managing trustee," someone who gives $100,000 a year to the Democratic National Committee.

But did the White House always give its funders the heavy preference they expected? That's less clear. Research from another watchdog, the Center for Public Integrity, indicates that non givers outnumbered givers on trips 2 to 1. Records compiled by the group show that in the early 1990s, at least 187 firms (including Time Warner, parent company of TIME's publisher) took part in trade missions sponsored by Commerce. Of those, 67 firms, or 36%, were Democratic party donors. And many of those gave money to the G.O.P as well. -- By Richard Lacayo With reporting by Viveca Novak and Mark Thompson/ Washington

NEWSWEEK
11/04/96
FRONT COVER

CLINTON COATTAILS: CAN HE WIN BACK CONGRESS?

PHOTOGRAPH (two women)
We're Having as Baby

Can Gay Families Gain Acceptance"

What It's Like for the Kids

Melissa Eatheridge and her pregnant partner Julie Cypher

NEWSWEEK
11/04/96

NOW, THE TAIWAN AXIS: John Huang, the elusive Democratic fund raiser, faces questions about access and foreign cash.

By Michael Isikoff and Melinda Liu

John Huang, the elusive Democratic fund raiser, faces questions about access and foreign cash UNASSUMING, ENERGETIC AND A tireless networker, John Huang, 51, spent much of the past five years building links between Asian-Americans and the Democratic Party. A former banker who wears Brooks Brothers suits and drives a white Mercedes, Huang has ties to Bill Clinton that go back to Little Rock--and Huang's relationship to the Riady family, the Indonesian-based Chinese billionaires whose "soft money" contributions to the Clinton campaign are at the heart of a late-breaking election scandal, runs even deeper. All of that makes Huang--a former Commerce Department official and, until quite recently, one of the Democratic National Committee's most prolific fund misers--the target of something very much like a manhunt. When a federal judge asked where Huang was last week, his lawyer said Huang's whereabouts were a "client secret." Unamused, the judge ordered Huang to show up for questioning anyway, and DNC officials promised he would be at their offices in Washington to receive a subpoena this week.

The lawsuit in question is only a fishing expedition by a conservative watchdog group, Judicial Watch, that has been trying for years to expose the political activities of the U.S. Commerce Department during the tenure of the late Ron Brown. But the political implications are obvious and troubling: Brown himself was a former chairman of the DNC, and Huang, who got a top-level Commerce job in 1994, moved over to the DNC as a party fund raiser just in time for the '96 campaign. Because of his ties to the Chinese-American community--he was a member of the DNC's Asian Pacific American advisory council--Huang was spectacularly good at raising money. By the DNC's own tally, Huang orchestrated an effort that tapped Asian-American donors for

nearly $5 million for the Clinton campaign. One of those contributions--$250,000 from Cheong Am, a Korean manufacturing firm--was clearly illegal, and the DNC has been forced to return it. Others, like the $140,000 donated in part by presumably penniless monks and nuns during a fund-raiser attended by Al Gore, could raise serious legal issues; the DNC refunded $15,000 from the Buddhist bash. At the DNC's request, the Federal Elections Commission will investigate--and Huang is the only man who can answer the questions. "All they [the DNC] are doing is trying to push this back until after the election," a nervous White House staffer said.

"And then we'll all watch it blow up."

It might--and if it does, the resulting explosion may well reveal the changing nature of the Taiwanese connection to U.S. politics. Taiwan has been a Republican cause since the days of Chiang Kai-shek and Clare Booth Lute. But the old days are over, and the Taiwanese, who worry whether they will be next on Beijing's agenda, have every reason to look for American support. Huang seems to have capitalized on that anxiety. Born on the mainland but educated on Taiwan (he also got a degree from the University of Connecticut), Huang now lives in Glendale, Calif. He got a political appointment to Commerce in 1994 and became Ron Brown's special emissary to Taiwan. Department officials say he made three trips to the island to hobnob with Taiwanese businessmen.

In May 1996, Huang was back in Taiwan again--this time on a political fund-raising trip paid for by the DNC. Party spokeswoman Amy Weiss Tobe said Huang was "prospecting" for donors among U.S. citizens and resident aliens on the island. The trip coincided with President Lee Teng-Hui's inauguration, and Huang joined a group of American guests that included Vernon Jordan and James C. Wood, an Arkansas lawyer appointed by Clinton as chairman of the American Institute in Taiwan.

NEWSWEEK has learned that senior Taiwan officials have privately complained that Wood pressured Taiwan businessmen for contributions to Clinton's re-election drive--and that the State Department's inspector general has received reports that at least one Taiwan entrepreneur tried to deliver cash to someone he thought represented the campaign. As NEWSWEEK'S sources told it, Wood told Taiwan

businessmen Clinton deserved to be "rewarded" for granting a U.S. visitor's visa to President Lee--then steered them to Huang. According to Nat Bellocchi, Wood's predecessor at the institute, Taiwan officials and prominent businessmen were "disturbed by the methods being used to obtain political funds for the U.S. election campaign." Wood flatly denied the charge to NEWSWEEK last week, insisting that he only sought "a level playing field" for American businesses. But he acknowledged that his remarks about Taiwan's debt to Clinton could have been misinterpreted. Asked whether he ever suggested that Taiwan businessmen get in touch with Huang to make political contributions, Wood replied that "that could have happened"--then added he "couldn't recall" if it actually did.

Just what, if anything, is illegal in all of this remains to be seen: though foreign nationals are prohibited from contributing to U.S. political campaigns, donations from naturalized citizens and those who hold permanent-resident visas are perfectly legitimate. But the dollar amounts aren't trivial, and the policy stakes are large. The Taiwan connection may help force the campaign reform Clinton says he wants. But in the meantime, the DNC probably wishes Huang would disappear.

NEW YORK POST
Metro Edition
10/22/96

Campaign '96/14 days to go

'MARSHAL PLAN' FOR INDOGATE MAN

Group vows to force fund-raiser to talk
By Deborah Orin
Bureau Chief

Washington -- A legal watchdog group yesterday threatened to call in U.S. marshals to force Indogate figure John Huang to answer questions about shady foreign funds for Democrats.

The threat came as the Democratic National Committee did a hasty about-face and said it won't tell Huang -- who's ducked out of sight -- to answer questions from the news media after all.

But Judicial Watch, a conservative group, said it will go to court as early as today to enforce a judge's ruling that Huang must answer questions about U.S. trade policy for sale.

"We have reason to believe that he has fled or is about to flee the jurisdiction and we're ready to go to court to have marshals ordered to find him and serve him with a subpoena," said Larry Klayman of Judicial Watch.

DNC spokeswoman, Amy Weiss Tobe said there would be no comment until Huang is served with legal papers.

U.S. District Judge Royce Lamberth ordered Huang to answer questions in a freedom-of-information suit charging that the Commerce Department raised campaign cash by promising help with overseas business deals.

Huang -- a former Commerce official -- raised an estimated $5 million for Democrats and is at the heart of the questions about the legality of big-bucks contributions from Indonesian, Korean and Indian sources.

Republican Bob Dole has seized on Indogate in the last two weeks of the presidential campaign as a way to try to highlight ethics questions about President Clinton.

Dole -- trailing by double digits in all polls -- has accused the Clinton White House of running a "laundromat" to

wash "blatantly illegal" foreign contributions.

Clinton aides initially brushed off the campaign finance flop but yesterday hit back with an anti-Dole attack ad, suggesting the Clinton camp now sees the issue as a potential problem.

The Clinton attack ad accuses Dole of "desperate attacks" and notes that Dole has also taken money from foreign interests.

Clinton spokesmen Mike McCurry acidly tried to dismiss Dole's weekend call for ending all campaign cash from foreigners, unions and businesses as "a political death-bed conversion."

National polls show no sign Dole is scoring with his attack on "White House sleaze." Clinton led yesterday by 21 percentage points in CNN's tracking poll and 11 points in a Reuter-John Zugby poll.

But the DNC has given back $260,000 it admits were illegal contributions from a Korean firm whose chief demanded -- and got -- a meeting with Clinton.

DNC Chairman Chris Dodd hinted Sunday that he'd produce Huang to answer questions, saying, "We'll try and make him available" -- but yesterday aides said he wouldn't after all.

The DNC suspended Huang from fund-raising duties but has kept him on the payroll, ostensibly to help the Federal Election Commission examine whether or not his fund-raising was proper.

McCurry defended the decision to keep Huang under wraps, saying answering questions would "detract from his ability to clear up these contributions."

When a reporter said these remarks added up to "an extremely cynical performance." McCurry replied: "I don't know about that. I've seen worse, I've done worse."

NEW YORK POST
Metro Edition
10/24/96

Marshals told to find Indogate fund-raiser

By Deborah Orin
Bureau Chief

Washington -- A federal judge yesterday, ordered U.S. marshals to find Indogate figure John Huang and subpoena him for a deposition in a lawsuit probing charges of shady Democratic fund-raising.

"It's clear that Mr. Huang is sequestered and that he will not come forward without a court order." Larry Klayman, of the conservative watchdog group Judicial Watch told the court.

Huang is the $5 million fund-raiser linked to over a million dollars in questionable Democratic fund-raising including at least $250,000 the party now admits was illegal and has returned.

He is being subpoenaed in a freedom-of-information suit launched by Judicial Watch two years ago, seeking to see if the U.S. Commerce Department gave trade favors in exchange for Democratic contributions.

The Democratic National Committee has kept Huang on its payroll and refuses to let him speak to reporters.

But Klayman said Judicial Watch intends to videotape Huang's deposition -- which, he said, will include questions about Indogate fund-raising from Indonesia -- and will release it to the press.

Federal Judge Royce Lamberth ordered the marshals to find Huang -- after the U.S. attorney's office claimed it had been unable to locate him.

But the DNC said Huang wasn't there when marshals came looking.

"We suggested that they contact his lawyer," said DNC spokeswoman Amy Weiss Tobe, who says Huang is still in the

area.

Huang was a Commerce official when the agency was led by the late Ron Brown, also a former DNC chair.

Watch wants to determine if trade missions led by Brown were intended to reward Democratic fund-raisers by linking up big-bucks business deals overseas.

Huang is also an ex-official of the huge Indonesian Lippo group, which has long-time Clinton ties and which benefited from a billion-dollar deal with China arranged on a Brown trade mission.

Meanwhile, the U.S. Justice Department said it would release photos of jailed cocaine dealer Jorge Cabrera -- who gave $20,000 to Democrats -- visiting the White House.

Cabrera had a private dinner with Vice President Gore and visited the White House in exchange for his $20,000 donation -- just weeks before getting busted with 6,000 pounds of cocaine.

THE WALL STREET JOURNAL
10/24/96

REVIEW & OUTLOOK (Editorial)

Trifling With the Courts

On Monday, President Clinton's Press Secretary Mike McCurry laughingly told reporters that his boss's controversial campaign fund-raiser John Huang was too busy to talk to the press. Yesterday morning federal district Judge Royce Lamberth ordered U.S. marshals to go get Mr. Huang. As we went to press last night, the Democratic Party's most famous fund-raiser was a fugitive from justice.

Judge Lamberth ran out of patience in a two-year-old lawsuit involving the late Ron Brown's Commerce Department, so he ordered out the marshals. But when they showed up at the headquarters of the Democratic National Committee yesterday afternoon, Mr. Huang was nowhere to be found, and a committee lawyer professed perplexity at their assignment. Just another day living with the Clinton Administration in Subpoenaville, joy riding through the nation's laws.

Judge Lamberth yesterday also allowed a subpoena of Mr. Brown's widow to find out which of her late husband's documents she may have put in a storage facility on Georgia Avenue in the District. And there will be a subpoena issued to the Commerce Department's former special counsel for more documents since gone from Mr. Brown's offices. And finally, Judge Lamberth ordered federal marshals in California to track down Melinda Yee, another Clinton fund-raiser recently in the news.

All these parties have been named in a lawsuit brought by the watchdog group Judicial Watch, which for more than two years has been seeking documents from the Ron Brown days at Commerce to determine if his famous global trade junkets were also used to pay back or shake out campaign contributions for the Clinton-Gore re-election effort. The department's lawyers and lawyers for the office of federal attorney Eric Holder, who has attributed his job to Mr. Brown's efforts, have been resisting the group's search for the documents.

Let us divert a moment. If the mention of Judge Lamberth's name in this context is familiar to some of our readers, it's because we've all been down this resistance road before. Back in 1993, Judge Lamberth was among the first to discover what the Clintonites learned in law school when he adjudicated the suit seeking the identity of the people on Hillary's famous Health Care Task Force.

The Administration's lawyers said it didn't have to tell anyone who was on the task force, that the secret group was somehow exempt from the law governing federal advisory committees. An appeals court remanded the case to Judge Lamberth, who had said the government "submitted meritless relevancy objections in almost all instances" and that at least one excuse was "preposterous." Judge Lamberth referred Health Czar Ira Magaziner for possible perjury, but Mr. Holder declined to prosecute. The judge's current docket includes his announced intention to impose sanctions and fines for misconduct on the White House. So now with the Brown documents case it's deja vu all over again.

The case rings a bell in a second way, the Clinton practice of cleansing the office of any politically sensitive official in the Administration who dies. After Vincent Foster's 1993 suicide, White House General Counsel Bernie Nussbaum kept the Secret Service outside Mr. Foster's office while he and others went through files. Two years later, Congressional investigators used subpoena power to obtain the Foster Travelgate diary held by Mr. Nussbaum. Other Congressional subpoenas have been flouted right up to the brink of contempt of Congress votes.

It is getting late in the campaign, and we look forward to this Sunday when presumably some 90% of the nation's editorial pages, interrupting their quest for better campaign finance laws, will publish their endorsements of Bill Clinton for re-election. No doubt there will be a lot of coughing and caveating about distasteful "character" problems and whatnot, but make no mistake: The bar is being lowered on standards for the Presidency and public office generally. Just Tuesday, Vice President Gore finally explained his speaking appearance at the infamous Buddhist temple fund-raiser that John Huang arranged. The Vice President said he thought it was a "community outreach" event.

So while the nation's pundits and editorialists bend a knee to this relentless Presidential sophistry, it falls to the judicial branch to ferret out the truth. For all the press self-congratulation over the Watergate scandal, after all, it was up to Judge John Sirica to break the case by threatening provisional 40-year sentences to the perpetrators of two-bit burglary.

Until Judge Lamberth stepped up to defend court procedures, it appeared that the Clinton campaign, spouting as Mr. McCurry did about a need to "prepare" for a federal investigation, would succeed in secreting away John Huang until after the election. Assuming that the U.S. marshals don't have to track Mr. Huang into the mountains, Judge Lamberth's subpoenas at least ensure that lawyers for Judicial Watch will get to ask him some questions for all the rest of us about Bill Clinton's ways with money. Welcome to Subpoenaville.

THE WALL STREET JOURNAL
10/25/96

REVIEW & OUTLOOK (Editorial)

Trifling With the Courts -- II

Yesterday in this space, we reported the manhunt for John Huang, the former Lippo Group executive and now notorious fund-raiser for the Democratic National Committee. Once again as we went to press last night, Mr. Huang was nowhere to be found. After holding court sessions today and threatening DNC officials with subpoenas, federal district Judge Royce Lamberth has given Mr. Huang's Beltway lawyer until 9:30 this morning to produce him.

Judge Lamberth approved the subpoena for Mr. Huang on Tuesday so that he would answer questions about connections between his DNC fund-raising and his former trade job at the Department of Commerce. When U.S. marshals arrived at the DNC on Tuesday afternoon to serve Mr. Huang, an Asian gentleman standing in the lobby ran away from them. DNC officials then told the marshals that they didn't know how to find Mr. Huang. Joe Sandler, the DNC's general counsel, said the only address he had for him was in California. When the marshals then went to his home address in suburban Washington as provided by the Commerce Department, they were told by a relative he doesn't live there. Later that day, Judge Lamberth's office asked Mr. Sandler to appear in court the next morning.

However, yesterday morning Mr. Sandler sent word during the hearing that he wasn't coming. After Judge Lamberth threatened to send a marshal to subpoena him, the DNC's lawyer suddenly showed up at the court and was asked by the judge whether he was going to "continue to play games about being served."

Mr. Sandler denied he was playing games and introduced John Keeney of Hogan & Hartson as Mr. Huang's lawyer. Mr. Keeney is also on the board of trustees of the DNC's Lawyers Council. Mr. Keeney asked Judge Lamberth to "limit the scope" of Mr. Huang's deposition. "There has been a huge politicization of this that is totally unwarranted," Mr.

Keeney told Judge Lamberth. He then explained that he "had not been able to reach his client" about the subpoena. Mr. Huang's lawyer told Judge Lamberth yesterday that his client is not in Washington, D.C., but assured the court that Mr. Huang would return late next week and would answer a more narrow set of questions sometime after that. Mr. Keeney said he couldn't compel Mr. Huang to return to Washington, D.C.

"But, I can," Judge Lamberth interrupted him.

He then scheduled another hearing on Mr. Huang's compliance for this morning. Mr. Keeney quickly left the courtroom and refused to answer questions from the two reporters present -- from the Washington Times and this page. When asked if Mr. Huang had done anything illegal or unethical at the DNC, Mr. Sandler replied: "Not as far as we know."

Late yesterday afternoon, John Keeney faxed a letter to Larry Klayman of Judicial Watch, which had sought the subpoenas, saying he had contacted his client and "Mr. Huang has agreed that he will appear on any of the following days: Nov. 6, 7 or 8." The election is Nov. 5, and Judge Lamberth's schedule will have to adjust.

Meanwhile, Ira Sockowitz is hanging tough. Judge Lamberth on Tuesday approved a subpoena for Mr. Sockowitz, who was Ron Brown's special counsel at Commerce. The watchdog group Judicial Watch wants to ask him to answer questions about files that may have been taken from Mr. Brown's office and stored.

Mr. Sockowitz's lawyer faxed a letter yesterday to the district court requesting that the subpoena be modified "to extend the time for required response to and including Monday, Nov. 4."

And so just as the political establishment confers re-election on Messrs. Clinton and Gore, we have learned that John Huang was involved in an apparently illegal $245,000 contribution from a Korean businessman, since returned; facilitated a relationship of mutual benefit between Bill Clinton and the Riadys of Indonesia; and set up a shady fund-raiser at a Buddhist temple, which the featured speaker, Vice President Al Gore, now calls a "community outreach" event.

Meanwhile, the press secretary of the Clinton White House

laughingly tells annoyed reporters Mr. Huang isn't available "because it takes time to talk to you." But this week, when an ongoing lawsuit seeking information into Ron Brown's trade junket operation results in a subpoena to force Mr. Huang's appearance, virtually the entire Washington press corps ignores the story, not even bothering to cover the appearance of DNC officials and Mr. Huang's Hogan & Hartson lawyer before a federal judge. (Though Brian Ross broadcast a good report on ABC News last night.)

So far, Bill Clinton's use of the executive branch of government to buffalo the others has been an extraordinary spectacle. Investigations by the legislative branch have been turned aside, its subpoenas flouted.

The press, the fourth branch of government, has largely quit. Some 2,500 accredited Washington reporters have transferred their judgment and authority to the pollsters.

Now, however, in Judge Royce Lamberth, the administration will attempt to buffalo the third branch. It may suit Mr. Clinton's purposes to stonewall the details of the Huang operation past Nov. 5, even at the risk of incurring obstruction of justice charges. But the larger game is setting the stand-off terms for the much larger constitutional struggle with the judiciary that will ensue should Mr. Clinton make it past November 5.

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REVIEW & OUTLOOK (Editorial)

Clinton's Masons

The election is over, which means the Clinton masons can return to building the biggest stonewall in the history of American politics.

At one end of the stonewall, the Clinton Justice Department one week after the election came up with a blanket argument whereby the White House doesn't have to answer any pending Congressional subpoenas: It claims that after a Congress adjourns, its subpoenas cease to have any legal effect.

This is quite something. Observers specializing in the study of the Clinton stonewalls will recall that we have analogized them to Dean Smith's famous, clock-killing four-corner offense at North Carolina. This latest gambit might be called the Cinderella offense, by which subpoenas become pumpkins at the adjournment bell. Clinton Justice wants to force new subpoenas to be issued by the next Congress, a procedure that could take two to three months. But by then no doubt new legalistic boulders would be rolled into place against the details of those subpoenas. This one could get interesting.

Meanwhile, at another point on the Great Wall of Refusal, the Clinton National Security Council now refuses to let Congress look at 33 of 36 trade documents that were improperly removed from the Commerce Department and stored for months in a safe at the Small Business Administration.

The trade documents in dispute were removed from the late Secretary Ron Brown's office by his special counsel, Ira Sockowitz, who moved to a new job at the SBA, where he made a special request for a safe to store them. Observers specializing in the fund-raising activities of the Democratic National Committee will recall that the documents are under subpoena as part of a Freedom of Information Act lawsuit brought by Judicial Watch, a watchdog group whose efforts set in motion the surfacing of John Huang and the Asian

contribution pipeline. This in turn has given us what might be called the DNC's Perfect Act of Contrition Strategy: "We took all this money which somehow turned out to be illegal but we sincerely gave it back and we've all said five Hail Marys so everything's OK now." Last week saw the latest trip to this confessional, as the DNC announced it was returning that famous $450,000 contribution made by an Indonesian gardener with ties to the Lippo Group, Mr. Huang's former employer.

The documents in the SBA safe concern negotiations for large sales of satellite and telecommunications technology to China, Russia and India during the time Mr. Huang worked at Commerce. Congressional investigators have been blocked for weeks from seeing the classified documents to determine their possible relevance to their investigations of potential misbehavior at Commerce.

Earlier this month, Alan Kreczko, the NSC's legal adviser, instructed the SBA not to allow any Congressional review of the documents, even by Rep. Larry Combest, the chairman of the House Intelligence Committee.

Mr. Kreczko noted that while a Congressional committee is investigating why Mr. Sockowitz took the documents from Commerce, it "is not clear why the committee needs access to the text of those documents for its inquiry." This sophistry prompted Rep. Combest and four other House committee chairmen -- William Clinger of Government Reform, Jan Meyers of Small Business, William Thomas of House Oversight and Donald Manzullo of an exports subcommittee -- to write White House Counsel Jack Quinn in protest.

They note that if the White House is in fact invoking executive privilege as the reason for withholding the documents -- the only real reason to issue such a refusal -- it will have to provide a detailed index of the documents and reasons why each is covered by executive privilege. So far none has been provided and "only then can we assess the validity of the executive privilege claim," they wrote.

A fishing expedition? How can you call it a fishing expedition after all the record-sized fish that have been getting pulled from these waters? Recall that the last time the White House claimed executive privilege was over 2,000 pages of documents relating to the Travel Office firings. They were turned over just before the House planned to vote Mr. Quinn

in contempt. And as it turned out, one memo among the 2,000 pages led to Filegate -- a big fish called Craig Livingstone and the discovery that the White House had gotten its hands on some 900 FBI files on Republican appointees.

Before the election, a lot of people across the political spectrum, viewing the administration's stonewall masons at work, asked what these people could be hiding. Having run out the clock once, the White House now hopes interest will wane, even as it argues that subpoenas are pumpkins and privilege is in the eye of the document holder. Congress, in short, is being told to get lost. In the new spirit of the times, it should refuse.

AsianWeek
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Democrats Eye The Disgruntled APA Voter.

By Sam Chu Lin

With the election a few days away, the Democratic Party is making it clear it is after the Asian Pacific American vote, and that it is actively supporting several candidates from the community. The White House has also released a memo listing the appointments of Asian Pacific Islander Americans to the administration in an effort to convince APA voters the Democratic Party should be their party of choice.

Vida Benavides, director of the Asian Pacific Islander American Political Desk for the DNC, said, "We have over 120 appointments in the last 23 months of this administration. Comparing the Bush and Clinton administrations, we have 3 percent, and Bush had barely 1 percent.

Doris Matsui, Asian Pacific American liaison at the White House, proudly underscores that fact and the level of those appointments. She said, "This administration has appointed more Asians that require senate confirmation. The president has also probably done more for women than any other administration. Of the APIA appointments, over 50 percent of them are Asian Pacific American women."

Spokespersons for the administration also emphasize Asian Pacific Americans are filling a variety of positions in government and are not being pigeonholed into nondescript jobs that have no real responsibility. In the long list that has been put together, they cite such examples as Frederick Pang, assistant secretary of defense; John Huang, deputy assistant secretary for international economic policy in the Commerce Department; Ginger Lew, general counsel for the Commerce Department; Valerie Lau, inspector general for the Treasury Department; Lorraine Chong, deputy assistant secretary, Employment & Training Administration for the Labor Department; and Denny Chin, a judge for the U.S. District Court in New York, just to name a few.

When party officials are asked about the president's pledge to "make the administration representative of America's

diversity" and the absence of Asian Pacific Americans in a cabinet position, Benavides said, "I think it's on its way to happening. We are really basically starting from scratch. Someone who is a deputy assistant secretary will be assistant next time. It's a process that we're trying to build. [Congressman] Norman Mineta has turned down the

[only preceding portion of the article was submitted to Judge Chin].

Text of Constitutional Provisions, Statutes and Rules Involved

Rule 4 of the General Rules of the Southern and Eastern Districts of New York provides in applicable part:

(f) If, in connection with activities in this court, any attorney is found guilty by clear and convincing evidence, after notice and opportunity to be heard, of conduct violative of the Codes of Professional Responsibility of the American Bar Association or the New York Bar Association from time to time in force, the attorney may be disciplined by this court, in accordance with the provisions of paragraph (g).

(g) Discipline imposed pursuant to paragraphs (c), (d), (e) or (f) may consist of suspension or censure. In the case of an attorney who is a member of the bar of this court, it may also consist of striking the name of the attorney from the roll. In the case of an attorney admitted pro hac vice, it may also consist of precluding the attorney from again appearing at the bar of this court. Upon the entry of an order of preclusion, the clerk shall transmit to the court or courts where the attorney was admitted to practice a certified copy of the order, and of the court's opinion, if any....

* * *

(k) Misconduct of any attorney in the presence of this court or in any manner in respect to any matter pending in this court may be dealt with directly by the judge in charge of the matter or at said judge's option referred to the committee on grievances, or both.

DR 1-102(A)(5) provides that:

> A lawyer shall not... [e]ngage in conduct that is prejudicial to the administration of justice.

DR 7-106(C)(6) provides that:

> In appearing as a lawyer before a tribunal, a lawyer shall not... [e]ngage in undignified or discourteous conduct which is degrading to a tribunal.